A SHORT COURSE IN COMMERCIAL LAW

NICHOLS AND ROGERS

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A SHORT COURSE IN COMMERCIAL LAW

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PREFACE

THERE is an insistent demand for a commercial law text that can be covered thoroughly and completely in a comparatively short time, and this book has been prepared to meet these conditions.

The authors have included in the text all the essential topics, and have kept the book within the prescribed limits by excluding topics that are not of sufficient importance to be a part of every commercial course. The language used in the text is neither legal nor technical, so that teachers, even without special legal training, will find the subjects easy to teach and unusually interesting to the student.

The actual cases presented in connection with the legal principles treated in the text were selected with great care from court records, and their study in connection with the study of the legal principles on which the decisions were based cannot fail to add greatly to the interest in, and value of, the subject.

The lesson plan is a feature which it is believed will be appreciated.

CONTENTS

	PAGE
Law in General	1
Contracts	5
Parties	8
Subject Matter	12
Mutual Assent	15
Consideration	23
Discharge	28
Property	63
Contracts for the Sale of Personal Property	70
Real Property Contracts	100
Contracts for the Bailment of Personal Property	124
Innkeepers	137
Common Carriers	142
Negotiable Instruments	154
Bills of Exchange	164
Negotiation and Indorsers	169
Fire Insurance	189
Life Insurance	196
Guaranty and Suretyship	216
Agency	233
Partnership	250
Corporations	266
Procedure and Remedies	285
INDEX	295

A SHORT COURSE IN COMMERCIAL LAW

LESSON I

LAW IN GENERAL

1. Definition.
2. Classification.
3. Commercial Law.

1. Definition. — Law has been defined as "a rule of action," on the theory that all action is governed by some well-defined law.

2. Classification.

AS TO SCOPE

Natural Law is that law according to which all nature is governed and has, therefore, a wider scope than any other kind of law.

Moral Law is the law of right and wrong which should govern all human beings in their intercourse with each other. It stands next to natural law in scope, since it is world wide in its application.

International Law is that law according to which dealings between citizens of different countries are carried on. It has its foundation in treaties, cus-

toms, and agreements which have been entered into from time to time between nations for the guidance of their citizens in their intercourse with each other.

Municipal Law is the law which is made by, and for, the benefit of any unit of government. The laws of cities, counties, states, and nations belong to this class. This book treats of one branch of this law.

AS TO SOURCE

Constitutional Law is that law which has its origin in formal constitutions adopted by the people of any state or nation. The purpose of a constitution is to protect the rights and interests of the people as a whole, and to provide a broad foundation upon which to build a satisfactory government. Only the broadest rules of conduct can be laid down in a constitution.

Common Law is the name given to rules of action which have become fixed through long usage by the people of England and by the decisions of English courts. In early times when men first began to deal with each other, it became necessary to settle disputes that arose between individuals, and for this purpose a small body of men were often called together to hear the facts in a disputed transaction. Upon hearing all the evidence these men rendered a decision. When other disputes of a similar nature arose, it was customary to settle them in accordance with the decision which had been reached in the previous case. Soon this precedent came to have

the effect of law. At first these decisions were not reduced to writing and therefore had no permanent form. Later, when courts had been established for the trial of disputed claims, it became customary to make a permanent record of all decisions, together with the facts upon which the decisions were based. Thus, the great underlying principles upon which all laws are based at the present time, are embodied in a long line of court decisions.

Statute Law. A statute law is a law made by any legislative body. Much of the common law has been reënacted in the form of statutes. When the United States became an independent nation, it was determined that all the common law of England, and so much of the statute law of England as was applicable to our changed conditions, should be considered the common law of this country, and this law is still in force except where changed by statute. In the preparation of a book on Commercial Law it is necessary to adhere rather strictly to the common law. Where the common law has been changed by statute in any state, it will be necessary for students in that state to consult the statutes.

In this country the highest law under which we live is the Constitution of the United States. Next to this in authority are the laws enacted by Congress. The Constitution of the state in which we live comes next in authority, and the statute laws enacted by the legislature of the state stand fourth. Congress has the right to legislate only regarding interstate matters.

AS TO JURISDICTION

Criminal Law is that part of the law which has to do with the prevention and punishment of acts which are committed against the welfare of society as a whole, or any part of it. When a person steals a watch, this act of stealing is one that would endanger the property of the entire community in which the property was stolen, as no member of the community could be sure that his property would not be taken if the thief were allowed to go unpunished.

Civil Law is that part of the law which has to do with the relations between individuals. When a person enters into a contract with another, and then refuses to carry out the terms of his agreement, the only person who is injured is the one with whom the contract was made. The civil law is invoked against the one who has failed to carry out the terms of his contract.

3. **Commercial Law.** — Commercial law is that part of the civil law which has to do with the relations of persons in business. In treating this subject, it has seemed best to consider contracts in general first, and then to deal with the special contracts of personal property, real property, negotiable instruments, bailments, common carriers, innkeepers, insurance, guaranty and suretyship, agency, partnership, and corporations.

It will be noticed that the subject of contracts

runs through the entire book, and in treating the various subjects named, the contractual side is emphasized.

The chief purpose of commercial law is to familiarize students with the fundamental principles of law, in order that they may know their rights, and also that they may avoid making mistakes in their business dealings which would involve them in legal difficulties. While a person may safely handle legal matters of minor importance, it is not intended that those who complete the study of this text shall become their own lawyers, but rather that they shall know when the services of a lawyer are required, and to the utmost degree conduct their business in such a way as to eliminate the necessity for the employment of legal service.

LESSON II

CONTRACTS

4. Definition.
5. Elements.
6. Classification.

4. Definition. — A *contract* is an enforceable agreement between two or more competent persons, based upon consideration or in writing under seal, resulting in legal obligation to do or not to do some particular thing.

5. Elements. — From the definition it will be seen that there are four essential elements of a contract:

(*a*) Two or more competent persons.
(*b*) Legal subject matter about which to contract.
(*c*) Mutual assent to the terms of the contract.
(*d*) Legal consideration or the formality of a seal.

These elements will be studied separately after contracts have been properly classified.

6. Classification. — Contracts are divided as to form into *express* and *implied* contracts. Contracts are also divided as to fulfillment into *executed* and *executory* contracts.

An *express contract* is one in which the intentions of the parties and the terms and conditions of the agreement are settled and expressed when the contract is made. It is complete in itself. An express contract may be either *formal* or *simple* (parol).

An *implied contract* is one in which the parties do not make an agreement in words, but by their acts show an intention to contract, and from these acts an agreement in fact is implied and mutual obligations arise. For example, a builder went to a lumber merchant and said, "Send twenty bunches of shingles of A No. 1 grade to 187 South Ave." The merchant replied, "All right, they will be delivered to-day." The contract of sale is expressed, but the contract to pay the market price is implied. When a person steps on the street car, he enters into an implied contract with the railway company in which

it agrees by implication to carry him to his destination if such destination is on its line, either direct or by transfer, and to use due diligence and care to carry him safely, and he impliedly agrees to pay the regular fare for the service. This contract is implied from actions without spoken words.

There is another form of implied contracts, called *constructive* or *quasi* contracts. These are not true contracts, since there is no agreement between the parties, but the law implies a contract relation on account of the simplicity of the remedy and because reason and justice require that some obligation should exist. For example, if A, to save himself from loss, should pay a debt which B should have paid, A may bring action against B just as though B had made a contract to pay A that sum of money. Clearly there is no sort of agreement between A and B, but the law implies an agreement in order that A may receive what is justly due him.

Since a contract is essentially an agreement between the parties, it need be in no particular *form*, and may be written or oral.

A *formal contract* is a written contract under the seals of the parties, and is called a *contract by specialty*. Of this sort are bonds, deeds, mortgages, etc.

All contracts other than specialty contracts are called *simple* or *parol* contracts. These may be either oral or written and no special form of words is necessary. At Common Law the only simple con-

tracts required to be in writing were those in the form of negotiable instruments, but various statutes have added to this requirement.

An *executed contract* is one the terms of which have been carried out. Nothing remains to be done by either party to the contract.

An *executory contract* is one for the fulfillment of which something remains to be done. A contract may be executed as to one party and executory as to the other. For example, A sells and delivers his horse to B, who promises to pay A $150 at a certain future time as full payment for the horse. The contract is executed as to A, and executory as to B.

LESSON III

PARTIES

7. In General.
8. Infants.
9. Persons Mentally Incompetent.
10. Married Women.
11. Alien Enemies.

7. **In General.** — Since every contract is an agreement, there must always be at least two persons concerned. In general, any person may make a contract upon any terms he pleases. There are certain classes of persons, however, who are unable to enter into contracts that will bind them, with a few exceptions.

These are infants, persons mentally incompetent, married women, and alien enemies.

8. Infants. — At common law every person under the age of twenty-one years is an infant. In some states the age of majority has been changed by statute. The law considers that an infant is unable properly to preserve his property, and for his protection has decreed that he cannot make a contract that will be binding on him except in certain cases. This does not mean that an infant's contract is absolutely void, it is merely voidable. When he becomes of age, or before, he may repudiate the contract. He may ratify it when he becomes of age, and if ratified it becomes a valid contract in all respects.

The privilege of disaffirming a contract on the ground of infancy is a personal one of which none except the infant can take advantage. Neither a parent nor a creditor can disaffirm an infant's contract. Nor can the adult with whom the infant contracts disaffirm or repudiate the contract.

There are two exceptions to this general rule regarding the ability of an infant to contract. First, he can always bind himself to pay for the necessaries of life, such as clothing, lodging, education, etc., provided he contracts for such things as are suited to his station in life, and which have not already been furnished him. An adult dealing with an infant must ascertain whether or not things purchased by him are necessaries. Even in the case of necessaries, the law will protect the infant who has agreed to pay

an excessive price. His contract will be set aside and the seller will be permitted to recover a reasonable price.

An infant may repudiate his contract, even though he is not in a position to restore the other party to his original position as regards the thing contracted about, but, if possible, he must restore anything received under the contract. For example, an adult who sells a horse to an infant will be obliged to return the purchase price upon the request of the infant, even though the horse has died since the contract was made.

It is generally held that a contract by which an infant secures the services of another as his agent is void, not merely voidable, particularly where the agency relation is created by a power of attorney under seal.

9. **Persons Mentally Incompetent.**—Since a meeting of the minds of the parties is necessary to create a valid contract, a person who is mentally incompetent cannot make a valid contract except for necessaries. Accordingly, a person may avoid a contract by showing that he was insane or intoxicated when the contract was made, and that his condition was apparent, or otherwise known to the other party. Such a contract is voidable, not void, and may be ratified when the person is restored to a rational mental condition. A person may be judicially declared incompetent on account of idiocy, insanity, or habitual drunkenness, and a guardian will be ap-

pointed to manage his property. Thereafter the incompetent can make no valid contracts, as his guardian has full charge of his affairs.

If a person innocently makes a contract with one who is insane at times and rational at other times, he may enforce the contract if it be one of a kind the repudiation of which would cause a loss to him. This would not be true, however, if the insane party had been declared insane judicially. It would come under the general rule that where one of two innocent persons must suffer a loss, the one who made the loss possible is the one who should stand it.

10. Married Women. — Under the common law, when a woman married her property rights were merged in those of her husband. She lost her identity as far as the contracting privilege was concerned. This common law disability has been quite largely removed, and in many states a married woman may contract as freely concerning her individual property as she could have done when single.

11. Alien Enemies. — When a country is engaged in war it is important that its citizens should have no dealings with the hostile country. It is assumed that while they are at war their interests are adverse, and to permit dealing of any kind at that time would open a way for unscrupulous citizens to make private profit out of harmful business, such as furnishing arms or other munitions of war. Considerations of public policy demand the sus-

pension of all contracts between alien enemies in time of war.

LESSON IV

SUBJECT MATTER

12. In General.
13. Acts against Public Policy.
14. Immoral Acts.
15. Fraudulent Acts.

12. In General. — We have discussed the first element of a contract and now turn our attention to the second element, namely, *subject matter*. The subject matter of a contract is the thing about which the agreement is made. The only requirement is that the subject matter shall be lawful. Anything which is in itself unlawful cannot be the subject of a legal contract the fulfillment of which would require the performance of an unlawful act. Among the acts that are considered unlawful are,

ACTS AGAINST PUBLIC POLICY

(*a*) *Unreasonable restraint of marriage.*
(*b*) *Unreasonable restraint of trade.*
(*c*) *Subversion of governmental functions.*

IMMORAL ACTS

(*a*) *Bets or wagers.*
(*b*) *Acts in desecration of the Sabbath.*
(*c*) *Criminal acts.*

FRAUDULENT ACTS

The law will aid neither party to contracts under any of the above heads, since both are equally guilty of wrong doing in entering into the contract. This is true even though refusal to recognize the contract relation would enable one or more of the parties to gain an advantage over the other.

13. Acts against Public Policy. — (*a*) Contracts in restraint of marriage are lawful if they are reasonable in view of all the circumstances. If, for example, a father enters into a contract with his son, providing for the payment of a specified sum of money on condition that the son will refrain from marrying until he is twenty-five years of age, such a contract is reasonable and would be upheld by the courts. If, however, the contract had provided that the son remain single during his lifetime, it would be considered an unreasonable restraint of marriage contrary to public policy, and the law would not recognize it as a valid contract.

(*b*) The same general principle applies to contracts in restraint of trade. If a retail meat dealer should sell his market and agree not to enter into the same kind of business in the United States, such a contract would not be upheld by the law as it would be considered an unreasonable restraint of trade. If, however, the agreement provided that the seller should not engage in the same business in a locality where he would draw any of his old trade, the con-

tract would be lawful and could be enforced. Only such contracts in restraint of trade can be made as will protect the interests of the contracting parties.

(*c*) A contract, the purpose of which is to interfere with the natural course of justice, is one *subversive of a governmental function*. For example, A agrees to pay B $100 if he will testify falsely regarding a case in which he has been called as a witness. Such an agreement would be void. Likewise, a contract for the sale of a public office or any emolument thereof would be classed under this head.

14. Immoral Acts. — (*a*) In the case of *bets or wagers* a court of law will not recognize such contracts as existing. The winner cannot successfully invoke the law to aid him in collecting the amount won nor can the loser call upon a court to assist him in recovering what he has paid as a result of a wager. In the case of wagering, where the money has been placed in the hands of a third party, a court of law will aid either party in recovering from the stakeholder the amount placed in his hands by that party. If the stakeholder refuses to pay it over upon the demand of the party that placed it in his hands, he is personally liable for the amount so refused. The law will interfere to this extent, not to undo an illegal contract, but to prevent the consummation of one.

In the majority of states it has been held that contracts made in the regular course of business on Sunday may be enforced. If, however, the business

transacted in any way interferes with the observance of the Sabbath by any individual or class of individuals, such contracts will be void.

Any contract which, if carried out, would cause one or both parties to commit a crime is void.

15. **Fraudulent Acts.**—Any contract, the object of which is to defraud one or more of the parties interested, the general public, or other persons, is void as an immoral act.

LESSON V

MUTUAL ASSENT

16. Mutual Agreement.
17. Offer and Acceptance.

16. **Mutual Agreement.** — We now come to the discussion of the third element of a contract, agreement or mutual assent. The consent of the parties to the terms of the contract understood alike by all the parties concerned, must be complete and definite. Any agreement that is obtained by fraud or compulsion is invalid, since there has been no real consent by the party defrauded or coerced. A mutual agreement consists of an offer and an acceptance.

17. **Offer and Acceptance.** — The offer must be definite and must be made with the intention of creating a legal obligation. One made in jest or

anger and so understood by the offeree cannot be made the basis of a contract.

An offerer may make any terms he pleases in his offer as to the time, place, manner, or condition of its acceptance, and may insist on an exact compliance with them. This is true, however unusual or unnecessary the terms may be, as there would be no meeting of minds if the acceptance differed in any respect from the offer. A conditional or qualified acceptance is the same as a rejection of the offer, and is in reality the substitution of a new offer which can be in turn accepted or rejected by the original offerer.

An offer should be accepted in the exact manner in which it is offered unless some other method is indicated by the offerer.

To be effective, the offer must be communicated to the offeree with the knowledge and consent of the offerer. If A renders services for B without B's knowledge, B is not bound to pay for them as there is no contract. Also, if A captures a criminal without knowing that a reward has been offered for such services, he cannot claim the reward.

An offer does not remain open indefinitely. If the offer is made orally, it is understood to be withdrawn when the parties separate. If it is made by telegram or by letter, it is withdrawn when a sufficient or reasonable time has elapsed in which the offeree might have accepted it, usually the day of its receipt. The offer lapses upon its refusal by the offeree or on the death or insanity of either party.

When it has once been allowed to lapse it cannot be revived, but a new offer may be made in its place. An offer may be revoked by giving notice any time before acceptance.

Only the one to whom the offer is made can accept it unless the offer is a public one, when any one to whose attention it is brought may accept. If A offers to pay B for all the ice B delivers to him, and C buys B's business and continues to deliver ice to A who does not know of the change, A is not bound to pay C for the ice delivered by him, since there was no contract between A and C. A's offer was to B and C could not accept it.

An offer may require for its acceptance either an act or a promise. A contract made up of an offer accepted by an act is called a *unilateral* contract, as only one party is bound. Thus, if A offers to pay B ten dollars if he will walk five miles in an hour, B is not bound to perform the act, but if he does, A is bound to pay the money. The doing of the act is itself an acceptance of the offer and need not be communicated to the offerer.

An offer accepted by a promise creates a *bilateral* contract since both parties are bound. Thus, if A offers to sell B one hundred horses if B will agree to pay fifty dollars each for them, and B so agrees, both A and B are bound to perform their respective agreements. The acceptance of the offer is the promise to pay, and such an acceptance must be communicated to the offerer to be effective.

The acceptance of an offer received by mail is deemed to be communicated when it is placed in the mail box, or, in other words, when it has gone beyond the control of the acceptor. This is true even though the one to whom the acceptance is mailed never receives it. To hold the offerer to his contract, it is only necessary to prove that the acceptance was mailed within a reasonable time from the date of receipt of the offer. Custom sanctions the use of the mails in the transaction of business, and in many cases this is the only method that could be employed to advantage. Since this is the case, the offeree has done all that could be expected of him when he mails his acceptance, and it is only fair to consider that the contract dates from the time of such mailing.

LESSON VI

MUTUAL ASSENT — CONTINUED

18. REALITY OF CONSENT.
19. MISTAKE.
20. FRAUD.
21. FIDUCIARY RELATIONS.

18. Reality of Consent. — When two parties give their mutual assent to the terms of a contract, it is understood that there has been an absolute *meeting of minds*, and that both parties understood the terms of the contract alike. It sometimes happens that

either mistake or fraud enters into the negotiations, and, as we shall see, this sometimes vitiates the agreement.

19. Mistake. — When the mistake regarding the contract is mutual, except where the mistake is as to the quality of the thing contracted about, the contract is void. No obligation could arise where there was no meeting of minds due to a misapprehension on the part of both contracting parties.

In some cases the mistake is made by only one party to the contract, and is called a *unilateral* mistake. The mistake may be as to the existence of the thing contracted about. This is true where the subject matter of the contract has ceased to exist without the knowledge of either party at the time the contract is entered into. Such a mistake will avoid the contract.

There is sometimes a mistake on the part of one or both parties as to the identity of the subject matter contracted about. For example, A owns two lots on opposite corners of two streets at their intersection. One of them is for sale, the other is not. B learns that A has a lot for sale, but is not aware that A owns two lots. B offers A two hundred dollars for his lot, but he has in mind the one that is not for sale. A, thinking B means the lot he has for sale, accepts the offer. When the mistake as to identity of the lot is discovered, the contract can be set aside. No obligation can result from such a contract.

A mistake as to the quality of the thing does not make the contract void. A misrepresentation regarding the quality would render the party making it liable in damages if the representation was in the form of a warranty.

Caveat emptor applies where the subject matter of the contract is present at the time the contract is made. It is a Latin expression meaning, "Let the buyer beware." When the buyer having an opportunity to inspect the goods he is purchasing, does inspect them, and relies upon his own judgment regarding their character or quality, he cannot avoid the contract or hold the seller responsible in damages for any loss that he may sustain. This makes it necessary for one who is not competent to judge of the thing he is buying to require the seller to give a warranty as to its quality.

If a mutual mistake is made regarding the legal effect of the contract where neither party is at fault, the contract is void as there is no meeting of minds.

Where the mistake has to do with the thing *promised* by either party, instead of as to the *subject matter*, the contract will be void if the party promising knew that the other party was laboring under a misapprehension as to the thing promised and did not make the matter plain to him. When a person makes a promise, he is bound to make his intention understood, and it is only right to require him to correct any misapprehension that may result either from the stupidity of the promisee or the lack

of clearness on the part of the promisor, when that misapprehension is known to the latter. He is, however, under no obligation to correct a mistake on the part of the promisee as to the quality or character of the thing under consideration when that mistake does not result from a misunderstanding of the promise made.

20. **Fraud.** — Fraud is a misrepresentation made intentionally or in reckless disregard of the truth, with intent to deceive and actually deceiving a second party who relies on the misrepresentation to his damage. Where fraud enters into the making of a contract, the contract will not only be voidable, but the party guilty of committing fraud is liable to a criminal action.

Fraud sometimes takes the form of *duress*. This occurs when a party is forced to enter into a contract by a threat of violence to his person or property or to that of a member of his immediate family. Consent so secured is of no validity.

Artful concealment of a material fact not discoverable amounts to fraud. Mere nondisclosure of a fact does not constitute fraud unless it is the seller's legal duty to disclose it, as where the parties stand in a confidential or fiduciary relation to each other.

The misrepresentation must be of a fact and not merely the statement of intention or opinion. Much latitude is allowed for dealer's talk. Mere prediction as to probable future value is not fraud. Promoters and others interested in the sale of stocks and other

securities are held more strictly accountable for the truth of their statements.

21. Fiduciary Relations. — Fiduciary relations exist where one party is in a superior position and is able to exert unusual influence over another. For example, a father has ordinarily a greater influence over his son than has any person outside the family. A lawyer in matters pertaining to the law has greater influence with his client than does any other person. A physician sustains a peculiar relation to his patient, and a guardian is in a position to exercise unusual influence over his ward. These are all *fiduciary relations*, and all contracts made between parties in such relations are scrutinized with the utmost care when they are brought before a court for adjustment. They are not necessarily void, but are considered contracts in which the utmost good faith must be exercised by the superior toward the inferior. If it can be shown that undue influence was brought to bear on the latter whereby he was induced to enter into a contract to his disadvantage, the contract will be set aside as lacking one of the essential elements of a contract, viz., meeting of minds. Contracts between persons in fiduciary relations come under the head of *uberrima fides* contracts.

LESSON VII

CONSIDERATION

22. Definition.
23. Presumption of Consideration.
24. Good Consideration.
25. Valuable Consideration.
26. Consideration may be an Act or a Promise.

22. Definition. — The fourth element of a contract is *consideration*, which must support all executory parol contracts. Consideration is defined as a benefit to the promisor or a detriment to the promisee. It is important that consideration should not be confused with *motive*. A manufacturer may sell goods at a very low price in order to introduce them to the public. His motive is the desire to advertise his goods, but the consideration of the contract is the price to be paid.

23. Presumption of Consideration. — At the common law, a seal dispenses with the necessity for consideration, and it is generally held that any mark placed after the signature, and intended by the party signing to be a seal, will have the effect of sealing the contract. In the case of negotiable contracts, as notes or bills of exchange, there is a presumption of consideration which is conclusive when the contract is in the hands of a bona fide holder. This presump-

tion may be shown to be incorrect as between the original parties to the instrument. In a few states the same presumption exists by statute in favor of all written contracts.

24. Good Consideration. — There is a distinction made between good and valuable consideration. Ties of marriage, blood relationship, or natural love and affection are called *good consideration*, but are of little validity as they are void as against creditors or innocent purchasers. Thus, if A deeds land to B, his son, in consideration of his love and affection, B may hold the land against A, but if A had merely promised to deed it, B could not enforce the promise. Even if deeded, he could not hold the land under such a deed against a creditor of A or a purchaser in good faith from A.

25. Valuable Consideration. — A *valuable consideration* is any benefit to the promisor or any detriment to the promisee. It is not necessary that there be both a benefit to one and a detriment to the other. If the promisee does something he is not bound to do, or refrains from doing something he has a right to do, either will be considered valuable consideration and will support a contract. It is not necessary that the promisor receive any benefit from the act of the promisee. A third party may be benefited or it may be that nobody receives any substantial benefit. A surrender of a legal right is a detriment to the party who gives up such a right, and is therefore

valuable consideration upon which to found a contract.

26. Consideration may be an Act or a Promise. — The consideration of a contract may be either an act or a promise. A promises to pay B $100 any time he is ready to deliver to him a boat made according to specifications furnished by A. B may decide to accept A's offer, but there is no contract until B has built the boat and is ready to deliver it. But as soon as B delivers the boat, the promise of A becomes binding. If A had offered B $100 for the boat to be built by him and exacted from B a promise that he would build the boat in accordance with specifications furnished, and B accepts the offer, and promises to build the boat, mutual promises are made and each promise is a consideration for the other. In such a case if either party fails to perform his promise, he will be liable in damages.

A promise, in order to be valuable consideration, must be one that is capable of fulfillment, and the thing promised must be both legal and moral in order to be sufficient consideration. An agreement or a promise to do that which is illegal is not sufficient consideration to support an agreement.

There must also be a legal liability within the contemplation of both parties when the promise is made. Thus a promise to do what one is already bound to do either by law or contract, does not furnish consideration for a contract, since there is no detriment or benefit.

LESSON VIII

CONSIDERATION — Continued

27. Adequacy of Consideration.
28. Consideration as to Time.
29. Moral Obligation as Consideration.
30. Failure of Consideration.

27. Adequacy of Consideration. — It is not required by law that the consideration for a contract be adequate in a financial sense, except in a contract for the exchange of money. It is left for each party to determine whether the consideration which he receives for his promise is adequate. The only requirement of the law is that it shall be a benefit to the promisor or a detriment to the promisee, however slight the benefit or detriment may appear to be.

One who pays less than is due on a debt which he owes does nothing that he is not obliged to do, and therefore such payment will not be sufficient consideration to support a promise on the part of the creditor to release the debtor from further payment. Even a promise to extend time of payment must be supported by consideration.

28. Consideration as to Time. — In point of time consideration must be either present or future. Past acts are never considered valuable consideration upon which to base a promise to perform an act in the future. For example, if A has at some time received

a benefit from B for which he was not bound to pay, and A now makes a promise, in consideration of this past service, to pay a certain price for it, his promise is not enforceable since the promisor gave nothing for it. At the time the service was rendered it was merely voluntary, and no legal obligation was intended by either party. It should be stated, however, that if the past service was rendered at the request of A, courts of law are inclined to modify this rule regarding past consideration, and to treat the subsequent promise of payment as a mere expression of an implied promise made at the time the service was requested. This is really no exception to the rule, as cases of this kind are not decided on the ground of past consideration, but on the more satisfactory ground of a promise implied from the request for the service when made.

29. **Moral Obligation as Consideration.** — A moral obligation cannot be valuable consideration for a contract. A son is under the strongest obligation to support his aged parents, but a promise to do so because of this obligation is unenforceable as there is no consideration.

30. **Failure of Consideration.** — This is the term that is applied when the subject matter has ceased to exist before the execution of the contract without the fault of either party. In such a case the contract is terminated without liability. In reality there is no failure of consideration, but the contract

is terminated because the continued existence of the subject matter is an implied term of the contract. For example, A agrees to buy from B a cargo of iron, to be shipped from Scotland to New York, and B agrees to deliver it to A in New York. On the voyage the ship is lost at sea. Neither party is responsible for this loss, and since the subject matter has ceased to exist, the courts hold that the contract and all liability under it are at an end.

LESSON IX

DISCHARGE

31. Discharge of Contract.

31. Discharge of Contract. — The usual method of discharging a contract is by performance of the agreement by all parties to it. It sometimes happens that the parties to a contract decide to release each other from their obligations, and make a new agreement to that effect. This new agreement is called *Accord and Satisfaction.* This discharges the old contract provided the new agreement conforms to all the requirements of a contract.

Again, it often happens that the fulfillment of a contract by one or both parties to it is made impossible by circumstances over which neither party has control. For example, a law may have been passed after the making of a contract which would render per-

formance impossible. A contractor agrees to build a frame house for A. After the contract is made, an ordinance is passed prohibiting the building of frame houses in the section where A's property is located. This law would of course excuse the contractor from fulfilling his part of the contract. The destruction of the subject matter of a contract after the contract was entered into would excuse the fulfillment of the obligation providing the destruction did not occur through the neglect of the party desiring to be excused.

It must not be understood that a financial impossibility to perform will excuse a promisor from fulfilling his promise to pay a certain sum of money. When a party undertakes to perform a certain task for another or deliver certain goods to another without in any way qualifying his promise, he is bound to fulfill his promise or pay the damages that may result from his failure to do so, except in cases such as are illustrated in the preceding paragraph. The manufacturer who agrees to deliver a quantity of goods at a certain time, is not excused for his failure to fulfill his obligation which was caused by a strike among his employees. To protect himself against such contingencies he should include a clause to that effect in his contract.

When one of two parties to a written contract alters the instrument without the knowledge of the other party, and with intent to deceive the other party, the contract cannot be enforced. If, how-

ever, the alteration is made with no intention to deceive, the original contract can be enforced according to its terms. For example, A is asked by B to give him a note at thirty days in settlement of his account. A does so, and later B remarks that he is sorry that he did not ask that the note be made payable in fifteen days, as he will need the money at that time. A replies that he would have been perfectly willing to have made the note for that time. Later B changes the note to read fifteen days in the belief that A is willing to pay it at that time. A may refuse to pay the note before the expiration of the thirty days. The alteration having been made innocently does not make the contract void.

Where one of two parties fails to perform his part, the other party is relieved from further obligation. Even if the party has merely stated that he will not perform his part, the other party may immediately bring an action for breach of the contract.

Contracts are occasionally of such a nature that it is possible for one of the parties to fail to perform a part of the contract without giving the other party the right to assume that the entire contract is broken. Such contracts are said to be *divisible*. *Indivisible* contracts are those in which a breach of one of the parts of the contract by one party will enable the other party to consider the entire contract broken. It is sometimes very difficult to determine whether a contract is intended by the parties to be divisible or indivisible. This question of divisibility is raised

most often in contracts for the sale of a certain quantity of merchandise, to be delivered in installments. The important question in such cases is whether the failure to deliver one of the installments will act as a breach of the entire contract. In the United States it is generally held that such contracts are indivisible, and therefore a failure to deliver any one of the installments will act as a breach of the entire contract.

Discharge of the contract may result through an act committed by one party to the contract that makes performance impossible. For example, A agrees to deliver his horse to B within thirty days and receive two hundred dollars in cash for him. The following day A sells the horse to a third party. By this act he makes performance of his part of the original contract impossible, and the other party is not bound to wait until the expiration of the thirty days before beginning proceedings for breach of contract.

Failure to accept legal tender does not discharge the obligation of the one offering it, but merely places the responsibility of collection and costs of a legal action on the one refusing it and cuts off interest which may otherwise be collected on overdue debts.

It should be understood that notes, checks, or any other form of promise to pay money need not be accepted in settlement of debts, as they are not legal tender. If accepted, they are merely conditional payments unless it is otherwise provided. When a person fails to pay a note, the party holding it may

return the note and sue upon the original debt, or he may hold the note and make it the basis of the action. If the note of a third party is taken in settlement of a debt, it is generally accepted as an unconditional payment except for the rights which the transferee has against the transferer as indorser.

When one party contracts to furnish another party a certain thing and stipulates that the thing when delivered shall be entirely satisfactory, he is bound to respect the judgment of the second party in a matter of personal taste, as, for example, a suit of clothes. But in the case of articles like machinery, where personal taste does not enter in, the contract is satisfactorily carried out if experts so decide, the buyer to the contrary notwithstanding.

A contract will be discharged when the parties to it agree to substitute a higher form of contract, as, for example, where a sealed contract takes the place of an unsealed one.

LESSON X

DISCHARGE — CONTINUED

32. NATIONAL BANKRUPTCY ACT.
33. STATUTE OF LIMITATIONS.

32. National Bankruptcy Act. — A National Bankruptcy Act was passed by Congress in 1898 and has been amended several times since then. This act now provides that "Any natural person, except a

wage earner, or a person engaged chiefly in farming or in the tillage of the soil, any unincorporated company and any moneyed, business or commercial corporation, except a municipal, railroad, insurance or banking corporation, owing debts to the amount of one thousand dollars, or over, may be adjudged an involuntary bankrupt upon default or impartial trial and shall be subject to the provisions and entitled to the benefits of this act. The bankruptcy of a corporation shall not release its officers, directors, or stockholders, as such, from any liability under the laws of a State or Territory of the United States."

As soon as the voluntary petition in bankruptcy is filed, or after a party has been adjudged a bankrupt upon an involuntary petition, it then becomes his duty to aid the court in every possible way in the work of ascertaining the amount of property which he owns and also the total amount of his debts. A trustee in bankruptcy is appointed by the creditors, and it is the duty of such trustee to take over all the property of the bankrupt, except such as may be exempt under the law, and dispose of it for the benefit of the creditors. When the interests of the creditors require it, the trustee may continue the business of the bankrupt for a given time to prevent unnecessary sacrifice incident to a forced sale.

A person who commits certain acts may be adjudged an involuntary bankrupt upon the petition of his creditors. Among these acts are the following:

Making any disposition of his property with intent to hinder, delay, or defraud his creditors, or any of them; transferring, while insolvent, any part of his property to one or more of his creditors with intent to give such creditors advantage over other creditors; applying for a receiver or trustee for his property after becoming insolvent; admitting in writing that he is unable to pay his debts and that he is willing to be declared a bankrupt for that reason.

After one month, and within twelve months after being declared a bankrupt, he may file an application for his discharge in bankruptcy and the judge shall grant the discharge unless, at a hearing which is held to ascertain the right of the bankrupt to be discharged in bankruptcy, it shall appear that he has been guilty of some irregularity in connection with the settlement of his estate, or that certain requirements of the law have not been met. When the bankrupt has been discharged, he is free from any further obligation on account of contracts which he had entered into prior to his becoming a bankrupt.

33. **Statute of Limitations.** — In the different states a Statute of Limitations has been enacted which provides that actions founded on contracts shall be brought within a specified time or no action can be maintained. The purpose of this statute is to require a settlement of claims before they have run so long as to make it practically impossible to secure satisfactory evidence concerning them. Under modern interpretation of this law it is not assumed that a

debt is paid after the statutory period has run, but merely that it has run so long that it is difficult for a complainant to secure the necessary evidence to prove his claim. The best evidence of this interpretation of the law is seen in the fact that under certain circumstances a claim may be revived.

The contracts of most importance that are barred by the Statute of Limitations are open accounts, written instruments, sealed instruments, and judgments. In the different states the statutory period on open accounts varies from two to eight years, but in the majority of states the statutory period is six years. The period on sealed instruments varies from four to twenty years. Actions on judgments in the different states may be brought in most cases within twenty years, but the time stated in the different statutes varies from five to twenty years. Each student should consult the statute in his own state for the actual statutory period.

The statute begins to run in nearly all states at the time when the complaining party is first entitled to bring his suit on the particular claim. Ordinarily, ignorance of the facts which give the cause of action will not have any effect on the beginning of the statutory period; however, if there is fraudulent concealment, the statutory period will begin to run only after knowledge of the facts has been obtained by the complaining party. The running of the statutory period will be interrupted by the absence of the debtor from the state. When one against whom

complaint is made is under a disability of any kind, such as insanity, infancy, etc., the period will begin only after that disability has been removed.

An old debt may be the consideration for a new promise to pay an account, even though collection of the account has been barred by the statute of limitations. This new promise must be made to the complainant or his agent or any one who has been expressly authorized to convey the promise to him.

Any acknowledgment on the part of a debtor to his creditor that the outlawed debt is owing, revives the obligation, and an action is maintainable on it because the law implies that one who acknowledges that he owes any one intends in that acknowledgment to make a promise to pay his debt. In some states it is required that the new promise or acknowledgment be in writing.

When a part payment of an outlawed debt is made, or when interest on such a debt is paid, the effect is to acknowledge the existence of the debt and thereby renew the promise of payment, and the statutory period will run the full time from such a payment.

LESSON XI

SPECIAL REQUIREMENTS

34. Statute of Frauds — Fourth Section.

34. Statute of Frauds. — It has been made clear that no particular form is necessary in making or-

dinary contracts. They may be made orally or in writing. If written, they may be sealed or unsealed. They may be made by implication, and in such cases the terms are not even expressed. There are some contracts which by their nature are easily misunderstood by the parties to them, or are not easily proved in case a legal action is founded upon them. In the year 1676 England passed a law the intention of which was to prevent fraud and perjuries, and that law contained one section known as "The fourth section of the Statute of Frauds," that provided as follows:

"No action shall be brought

(*a*) Whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate;

(*b*) Or whereby to charge the defendant upon any special promise to answer for the debt, default, or miscarriage of another person;

(*c*) Or to charge any person upon any agreement made in consideration of marriage;

(*d*) Or upon any contract for the sale of lands, tenements, or hereditaments or any interest in or concerning them;

(*e*) Or upon any agreement that is not to be performed within the space of one year from the making thereof;

unless the agreement upon which such action shall be brought, or some memorandum or note thereof,

shall be in writing and signed by the party to be charged therewith, or some person thereunto by him lawfully authorized."

It will be seen that contracts of the kind specified in the above statute could not be enforced in a court of law unless the complaining party could produce some written evidence signed by the party against whom he complains, tending to show that the contract in question was actually made.

These contracts are all likely to be the subject of litigation, and when oral proof alone is available it is difficult to arrive at a satisfactory settlement. Nearly all of the states have enacted a similar statute, and in most cases it is substantially the same as the old English law. It should be remembered that this statute does not make oral contracts of this class void, but merely provides that no action can be maintained regarding them unless there is a satisfactory note or memorandum. This memorandum may be secured after the contract is entered into, and will be just as valuable for the purposes of this statute as if it had been secured prior to the conclusion of the contract.

Administrator or executor's promise. — It often happens that an administrator or executor will be called upon by creditors of the deceased party for information regarding the amount that will be received by them when the estate is settled. An administrator or executor would be likely to give an estimate of the amount that would be paid, and it is

very easy for the creditor to read into what the administrator, or executor, says, a promise to pay the amount stated. Such an officer might even go further, and by way of emphasizing his own belief that the amount stated would be paid, promise in an offhand way that if the estate was insufficient to make such payment he would pay it out of his own pocket. This statement is made with no thought of legal obligation. Under the statute no promise of an administrator or executor to pay out of his own pocket any sum that should be paid by the estate can be enforced, unless the party seeking to enforce such promise can produce a written memorandum signed by the administrator or executor, or a properly authorized agent.

Promise to go security for the obligations of another. — It is common practice for one who is a stranger in a community to ask a friend to introduce him to the merchants with whom he expects to deal. It often happens that the merchant to whom such strangers are introduced reads into the introduction a promise on the part of the introducing party to answer for the debts of the one who is being introduced. In many cases the statement at the time of the introduction might be taken to mean just this, but in most cases no such intention is present in the minds of any of the parties concerned. To avoid needless litigation over such imaginary obligations, the Statute of Frauds provided that no man can be held to answer for any debt or default of another person

unless some written evidence of his obligation can be produced.

Marriage contracts. — All contracts for the payment of money or for the settlement of property in consideration of marriage must be evidenced in writing to enable an injured party to recover damages in an action at law. The nature of such contracts is such that it is very difficult to secure evidence concerning the contract, unless it has been reduced to writing. Contracts of this class are usually made in secret, and litigation may result from misunderstanding on the part of one or both of the persons interested.

Real property contracts. — Any contract for the sale of real property, or any interest in or concerning it, must be evidenced in writing to enable either party to bring action for its breach. It is assumed that where such important interests as those connected with real property are concerned, the contracting parties will for their own protection have some written memorandum of their agreement. The amount involved is usually large enough to justify this requirement of the statute.

Contracts not to be completed within a year. — This class of contracts is included in the list of those requiring written evidence because of the difficulty of securing evidence to prove them after such a long period of time has elapsed. Under this section of the statute only those contracts which by their nature could not be completed within a year are included.

For example, a contract made between A and B whereby A agreed to board and care for an aged parent of B during his lifetime would be an enforceable contract even though no written evidence could be produced, as it is a contract which could be fulfilled within the space of a year. The parent might live many years, but the fact that fulfillment within a year was within the contemplation of the parties, as a possibility, at the time of entering into the contract takes it out of the operation of the statute.

A contract for a year's labor where the term of service is to begin the following day, or later, comes under the statute, because at least a year and a day will be required for its fulfillment.

In New York state an oral lease of land for one year is valid, and no written evidence is required even though the period for which the property is leased is not to begin until a future date. A special statute makes this an exception to the general rule under the Statute of Frauds. Many states have enacted a statute requiring that all leases of real property be made in writing.

LESSON XII

35. Cases on Contracts.

(1) *White* v. *Corlies*, 46 N. Y. 467. — White was a builder and Corlies was a merchant. Corlies gave White specifications for fitting up offices at 57 Broad-

way and requested him to make an estimate of the cost of doing the work. This was in September. On the 28th of that month, White left his estimate with Corlies for consideration and requested that he be notified when a conclusion was reached. On the same day Corlies changed the specifications and sent White a new copy, including the changes, for his approval. White showed his assent to the change by signing the specifications and returning them to Corlies. The next day Corlies wrote to White stating that if he would finish up the offices at 57 Broadway in two weeks from that date, he could begin work at once. White did not reply to this note, but immediately commenced performing the contract by purchasing lumber and beginning work. The next day Corlies notified White that he had changed his mind and did not care to have the work done. White, having gone to some expense and performed a part of the work, brought an action against Corlies to recover damages.

(2) *Fogg* v. *Portsmouth Atheneum*, 44 N. H. 115. — Portsmouth Athenæum is a corporation organized to conduct a library and public reading room. Some magazines are subscribed for and paid for by the Athenæum, while others are donated by friends of the institution. The "Independent Democrat" was taken and paid for by the Athenæum for a certain period of time. When the bill was settled a memorandum was made on the back of it that the Athenæum no longer desired the paper. A few days

later the owners of the paper sold their business to Fogg, who, without knowledge of this notice to discontinue the paper, continued to send it for several years. This action was brought by Fogg against the Athenæum to recover for subscription price of the paper. The paper had been received and placed upon the shelves by the Athenæum each week.

(3) *Fitch* v. *Snedaker*, 38 N. Y. 248. — Snedaker published a notice offering a reward of two hundred dollars to any person who would give information that would lead to the arrest and conviction of the person guilty of a certain murder. On the following day Fitch, who had not seen the notice of reward, furnished evidence that led to the arrest and conviction of Fee for the murder mentioned in the notice. This action was brought by Fitch to recover the reward offered in the notice.

(4) *Jackson* v. *Bartholomew*, 20 Johns. 28. — Jackson owned a wheat stubble field in which Bartholomew had a stack of wheat which he had promised to remove in season for Jackson to prepare his field for a fall crop. The time for removal arrived, and Jackson sent word to Bartholomew requesting immediate removal of the stack of wheat, as he wished to burn over the stubble next day. Bartholomew's sons agreed to remove the stack by ten o'clock the following morning. Jackson waited until that hour, and then set fire to the stubble in a remote part of the field. Later, Jackson discovered that the stack had not been removed, and, fearing that it would be

burned, set to work and removed it himself. This action was brought to recover damages for work and labor in its removal.

(5) *Minneapolis and St. Louis Railway* v. *Columbus Rolling Mill*, 119 U. S. 149. — Columbus Rolling Mill offered, by letter dated December 8th, to sell the railway company two thousand to five thousand tons of iron rails on certain terms, and also stated that if the offer was accepted, a notice to that effect must be received prior to December 20th. On December 16th the railway company sent a telegram and a letter referring to the rolling mill's letter of December 8th, ordering *twelve hundred tons* on the terms stated. On the 18th of December the rolling mill declined by telegram to fulfill the railway company's order. On the 19th of December the railway company telegraphed an order for two thousand tons of rails in accordance with the proposition made on December 8th. The rolling mill refused to fulfill this order, claiming that their offer had lapsed.

(6) *Trainer* v. *Trumbull*, 141 Mass. 527. — Trumbull, the defendant in this case, was an infant who had no property in his possession, but had a reasonable expectation of inheriting a fortune of $10,000. His guardian placed him in the almshouse, but he was taken out by the plaintiff, who furnished him with board, clothing, etc., upon his promise to pay what these things were reasonably worth when he came into possession of the expected fortune. This action was brought to recover on the defendant's promise.

(7) *Diamond Match Co.* v. *Roeber*, 106 N. Y. 473. — The defendant, Roeber, was the inventor of the friction match, and in August, 1880, he sold all of his right, title, and interest in this patent, together with the exclusive right to manufacture friction matches anywhere in the United States except in the state of Nevada and in the territory of Montana, to Swift & Courtney & Beacher Co. He also agreed not to engage in the manufacture or sale of friction matches at any time except as an employee of the company to whom he sold this patent right. This company later transferred their rights in the friction match business to the plaintiffs in this case, the Diamond Match Co. Roeber, after serving several years in the employ of the company to whom he assigned his patent right, entered into a contract with a rival match company, in New Jersey, under which he was to become their superintendent. He also opened a store in New York for the sale of matches other than those manufactured by the plaintiff. This action was brought to restrain Roeber from engaging in the manufacture or sale of matches in violation of his contract.

(8) *Love* v. *Harvey*, 114 Mass. 80. — The defendant made a wager with the plaintiff as to the place of burial of one Dr. Cahill. The defendant claimed that Dr. Cahill was buried on the right-hand side of the main avenue of the cemetery, and the plaintiff contended that he was buried on the left-hand side of that avenue. Twenty dollars, the amount of the

wager, was placed in the hands of James Stack, who had agreed to act as stakeholder. It was determined that the body was buried on the right-hand side of the avenue, but before the money was turned over to Harvey, the winner, Love ordered Stack, in the presence of Harvey, to give him back the twenty dollars which he had placed in his hands. The stakeholder, however, paid all the money over to Harvey, who refused, upon request, to return the twenty dollars to Love. This action was brought to secure the twenty dollars which Love claims was wrongfully paid over to Harvey.

(9) *Smith* v. *Whildin*, 10 Penn. St. 39. — Smith, the plaintiff, was a constable in Philadelphia, and the defendant, Whildin, offered him $100 for the arrest of M. Crossin, against whom warrants had been issued on a charge of obtaining goods under false pretenses. Smith secured the arrest of Crossin on the warrants which had been sworn to, and then brought this action to recover the $100 which Whildin had promised him.

(10) *Duplex Safety Boiler Co.* v. *Garden*, 101 N. Y. 387. — The plaintiffs in this case entered into a contract with the defendant wherein it was agreed that they, the plaintiffs, should alter boilers belonging to the defendant and perform all the work connected with the repair of these boilers, and complete the job by the 10th of May following. It was further agreed that the work should be done in such a manner as to satisfy the defendant that the boilers as changed were a success and that they would not leak under a

pressure of 100 pounds of steam. The work was done and the boilers were turned over to the defendant within the stated time. They were accepted and used by the defendant. Later, upon being requested to make payment, the defendant said the boilers were not satisfactory and refused to pay. Experts were called in, and after a thorough examination by them, the boilers were pronounced satisfactory in every way.

LESSON XIII

(1) *Peters* v. *Westborough*, 19 Pick. (Mass.) 364.— This was an action brought to recover from the town of Westborough for the support of one Catherine Ladds. The facts were as follows: John Ladds, the father of Catherine Ladds, entered into a contract with the plaintiff, Peters, in which it was agreed that Catherine Ladds should be taken into the Peters family, where she was to be supported in exchange for her services until she was eighteen years of age, if after one month's trial she proved satisfactory. At the end of the first month plaintiff expressed himself as being satisfied with her, and she continued to render services for about nine months, when she was taken ill, and plaintiff notified the overseer of the poor of the town that he would expect the town to support her as her father was not willing to do so. No action was taken by the town of Westborough, and after a few months she died. The plaintiff now

seeks to recover of the town for her care. The contract between Peters and Ladds was an oral one

(2) In *Strong* v. *Foote*, 42 Conn. 203, the defendant, a minor fifteen years of age and the owner of a large fortune, had his teeth filled by the plaintiff, a dentist. The bill rendered amounted to $93. It was proved that the teeth were decayed and pained the defendant.

(3) In *Carpenter* v. *Carpenter*, 45 Ind. 142, plaintiff, an infant, had traded horses. He tired of his bargain, and, having tendered back the horse he received, demanded his original horse. It was refused.

(4) In *Kendall* v. *Lawrence*, 22 Pick. (Mass.) 540, an infant deeded certain land to another and after becoming of age neither voided nor confirmed the deed. After he became of age creditors of the infant tried to set aside the sale and take the land on attachment.

(5) *Morton* v. *Steward*, 5 Bradwell (Ill.), 533, was an action on a note given by an infant, and it was proved that the consideration was necessaries furnished the infant. The amount of the note showed that an excessive price had been charged for the necessaries.

(6) In *Spencer* v. *Carr*, 45 N. Y. 406, the parents of an infant six years of age deeded real estate to her. Subsequently, the parents deeded the same property in trust to another, and the infant, at the mother's request, signed the deed. Could the deed be set aside by the infant?

(7) *Peters* v. *Fleming*, 6 M. & W. (Eng.) 41, was an action in an English court for a bill of goods sold defendant, an infant. They consisted of four finger rings, a watch chain, some pins, etc., amounting to over eight pounds sterling. The plaintiff sought to hold the defendant for necessaries. It appeared that the defendant was a student at the University of Cambridge, that his father was a gentleman of fortune and a Member of Parliament.

(8) In *Hyman* v. *Cain*, 48 N. C. 111, defendant, who was an orphan about nine years of age, boarded with the plaintiff for about two years. An action was brought for his board.

(9) *Sterling* v. *Sinnickson*, 5 N. J. L. 756, was an action upon a written instrument promising to pay plaintiff $1000, provided he was not married within six months.

(10) In *Herreshoff* v. *Boutineau*, 17 R. I. 3, plaintiff hired defendant as a teacher of languages for six months, and defendant covenanted not to teach the French and German languages for any other person within the state of Rhode Island for one year thereafter. This action was brought on a breach of the contract by defendant.

LESSON XIV

(1) In *Perkins* v. *Clay*, 54 N. H. 518, defendant sold his cart and butcher business for $90 and agreed

that he would not carry on the same business on the same route for two years. Defendant, having broken his contract, was sued for damages.

(2) In *National Benefit Co.* v. *Union Hospital Co.*, 45 Minn. 272, the parties were two companies engaged in issuing benefit certificates entitling the holders to care and medical treatment in case of sickness or injury. Plaintiff had acquired a good business in Minnesota, Wisconsin, and northern Michigan, and entered into a contract with defendant agreeing for a certain consideration to refrain for three years from doing business in this territory except with railway employees. Was the contract valid?

(3) In *Johns* v. *Fritchey*, 39 Md. 258, a party sought to avoid a power of attorney given by him, on the ground that he was intoxicated when it was given.

(4) In *Carpenter* v. *Rodgers*, 61 Mich. 384, the plaintiff traded a good team of horses, worth $150 to $200, with defendant, a horse dealer, for a team worth about $75. It was shown that plaintiff was of feeble mind and scarcely able to do business, and that when the deal was made he was intoxicated to such a degree that he did not know what he was doing. What must the plaintiff do to set aside the contract?

(5) *Gribben* v. *Maxwell*, 34 Kan. 8, was an action to set aside a conveyance of real property executed by one Olive Gribben, a lunatic. The purchaser

did not know of plaintiff's insanity, and paid a fair price for the property. The grantor had not been judicially declared insane.

(6) In *Bush* v. *Breinig*, 113 Pa. St. 310, Breinig attended a public sale of real property, and having made the highest bid, the property was struck off to him. Afterwards, while so drunk as to be deprived of reason and understanding, he executed a written contract of purchase and paid part of the purchase price. Thereafter he sought to avoid the contract and brought action to recover the money paid.

(7) In *Carter* v. *Beckwith*, 128 N. Y. 312, plaintiff, an attorney, upon the request of B, who had been legally declared insane, instituted proceedings to have him adjudged sane, and to have the control of his property restored to him. In this proceeding it was determined that he was still insane, and the application was refused. After B's death, plaintiff presented his claim for services.

(8) *Boston & Maine Ry.* v. *Bartlett*, 3 Cush. (Mass.) 224. Defendant made a proposition in writing to plaintiff to accept a certain price for some land if taken within thirty days. Plaintiff accepted the proposition before the thirty days expired. Defendant refused to deliver a deed.

(9) In *Holmes's Appeal*, 77 Pa. St. 50, a party about to purchase a farm asked the owner whether the neighborhood was sickly or not, and declined to purchase if it was. The owner assured him that it was free from sickness, whereas fever and ague were

prevalent in the locality. What are the buyer's rights?

(10) In the case of *Hamer* v. *Sidway*, 124 N. Y. 538, one Story promised his nephew, William, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become twenty-one years of age, he would pay him $5000. William lived up to his part of the agreement and upon becoming of age asked his uncle for payment.

LESSON XV

(1) In *Aller* v. *Aller*, 40 N. J. L. 446, a father gave his daughter a written instrument under seal by which he promised to pay her $312. This was understood to be part of the money which the father had owed his wife, now deceased, and he felt it should go to the daughter, although there was no legal obligation. The defense to this promise was want of consideration.

(2) In *Baker* v. *Holt*, 56 Wis. 100, defendant in Connecticut wrote to plaintiff in Wisconsin, offering to sell him certain land at a stated price payable at a specified time, but said nothing about the place of payment or delivery of the deed. Plaintiff replied that he would take the land upon the terms mentioned, and added, "You may make out the deed, leaving the name of the grantee blank, and forward

the same to L. L. Mosher at Grand Rapids, Wisconsin, or to your agent, if you have one here, to hand to me on the payment of $200 and the delivery of the necessary security." This action was brought upon defendant's refusal to deliver deed as directed.

(3) *Graves* v. *Johnson*, 156 Mass. 211, was an action for the price of intoxicating liquors, sold and delivered by plaintiff in Massachusetts to a Maine hotel keeper with a view of their being resold by defendant in Maine, contrary to the laws of that state.

(4) *Boston Ice Co.* v. *Potter*, 123 Mass. 28, was an action for the price of ice furnished to defendant from April 1, 1874, to April 1, 1875. The defendant was supplied with ice by plaintiff in 1873 and, becoming dissatisfied, terminated his contract and made a new one with the Citizens Ice Company. Just before April, 1874, this company sold out to plaintiff. The court found that the defendant had no notice of the sale.

(5) *Jones* v. *Edwards*, 1 Neb. 170, was an action brought for damages because of alleged fraud in the sale of a horse. Jones bought the horse when he had a sweeny, stiffness in the neck, and other ailments. He cut the cords of his neck and doctored him up. Later, Edwards came and wanted to buy a farm team. Jones said he had what he wanted, and showed him this one and another horse, saying they were sound, as far as he knew, but that he never warranted a horse. He did not say a word as to the former ailments.

(6) *Trustees* v. *Pratt*, 93 Ill. 475, was an action on a note given by one Pratt to the trustees of a church as a subscription to enable them to procure a bell. Pratt died before the bell was purchased.

(7) In *Thwing* v. *Hall*, 40 Minn. 184, plaintiff made a contract to sell certain timber lands to defendant, thinking they contained seven million feet of fine lumber, defendant also believing there was good lumber there. The facts were that, unknown to either party, the land had been practically stripped of good lumber. Defendant sent a man who mistook the location and reported good lumber.

(8) *Bainbridge* v. *Firmstone*, 8 A. & E. (Eng.) 743, was a case in which defendant obtained plaintiff's consent to let him weigh two boilers belonging to plaintiff and promised to place them back in the shape in which he found them. Defendant took the boilers apart and weighed them and then refused to put them together again, claiming there was no consideration for his promise to put them back.

(9) In *Dearborn* v. *Bowman*, 3 Met. (Mass.) 155, Bowman was nominated for senator. Plaintiff rendered services and furnished literature to advance defendant's cause, but without any solicitation on defendant's part. After the election, defendant gave plaintiff his note for $60 for such services, and this action was brought on the note.

(10) *Kyle* v. *Kavanaugh*, 103 Mass. 356, was an action to recover for the purchase price of land. It

transpired that the defendant was negotiating for one piece of land and the plaintiff was selling another.

LESSON XVI

(1) In the case of *Sloan* v. *McElven*, 56 Ga. 208, Sloan & Co. sued McElven Bros., on a promissory note given by them, the consideration for which was the payment of a note against their father, who was dead. Before his death the father had become insolvent and had gone through bankruptcy.

(2) In *Eaton* v. *Avery*, 83 N. Y. 31, defendant made false representations to a mercantile agency as to the financial responsibility of his firm which asked credit of plaintiff. Plaintiff went to the mercantile agency and obtained the information given by defendant, and relying on this, he delivered goods to the firm on credit. This action was brought to set aside the contract of sale and to recover the goods.

(3) In *Flanagan* v. *Kilcome*, 58 N. H. 443, defendant promised to pay plaintiffs a certain sum if they would drop a lawsuit which they had commenced against her. This was done, but she did not pay the agreed sum and suit was brought to recover it.

(4) *Gibson* v. *Pelkie*, 37 Mich. 380, was an action for value of services on an agreement concerning a judgment which plaintiff was to collect, retaining one half for his remuneration. It transpired that no such judgment existed.

(5) In *Summers* v. *Vaughan*, 35 Ind. 323, plaintiff sold defendant an engine and machinery and took a note for same. This action was to recover on the note. Defendant claimed that after the sale the plaintiff had warranted the machinery, whereas in fact it was defective. Is the plaintiff liable on his warranty?

(6) In *McBratney* v. *Chandler*, 22 Kan. 692, plaintiff sued for services in presenting the claim of the Miami Indians at Washington. It was proved that the services were those of a lobbyist, and defendant contended they were illegal.

(7) *Wolford* v. *Powers*, 85 Ind. 294, was an action on a note given in consideration of a parent naming a child after the maker of the note.

(8) In *Smith* v. *Hughes*, L. R. 6 Q. B. (Eng.) 597, plaintiff offered to sell defendant some oats, and showed a sample. Defendant wrote the next day that he would take them at the price named. He afterwards refused to take the oats on the ground that they were new oats and he thought he was buying old oats. Nothing had been said at the time of the sale about their being old oats, but the price was high for new oats.

(9) *Smith* v. *Ætna Life Insurance Co.*, 49 N. Y. 211, was an action upon a life insurance policy. The defense was fraud in obtaining it. In the physician's examination it was asked whether insurer had a cough, occasional or habitual expectoration, or difficulty in breathing. The answer was,

"No cough; walking fast upstairs or uphill produced difficulty in breathing." The facts were that he had raised blood for two and one half years and that he died three months after the policy was issued.

(10) *Bainbrigge* v. *Browne*, 18 Ch. Div. (Eng.) 188, was an action to set aside, for undue influence, a deed given by children who were of age, to their father.

LESSON XVII

(1) In *Anderson* v. *May*, 50 Minn. 280, plaintiff contracted in March to raise and deliver to defendant 591 bushels of beans. Plaintiff delivered only 152 bushels because most of his crop was destroyed by early and unusual frost.

(2) *Hall* v. *Perkins*, 3 Wend. (N. Y.) 626, was a case in which a simple-minded, ignorant young man was induced by his uncle, a justice court lawyer, to accept a conveyance of land worth $240 in satisfaction of a claim of $500. The uncle was one of the executors of the estate which owed plaintiff.

(3) In *Morrill* v. *Nightingale*, 93 Cal. 452, plaintiff procured several promissory notes to be executed by defendant under coercion and intimidation, caused by threats of arrest, and he also had a warrant of arrest issued by a justice of the peace, not for the purpose of punishing defendant for a crime, but to compel him to pay the money or execute the notes.

(4) *Wood* v. *Steele*, 6 Wall. (U. S.) 80, was an action on a promissory note dated October 11, 1858, and made by Steele and Newson, payable to their own order one year from date. It was indorsed by them to Wood, the plaintiff. "September" had been stricken out and "October" put in as the date. The change was made after Steele had signed the note as surety and without his knowledge or consent.

(5) In *Wolf* v. *Marsh*, 54 Cal. 228, Marsh promised in writing to pay Wolf a certain sum of money. The note contained the following condition: "This note is made with the express understanding that if the coal mines in the Marsh Ranch yield no profit to me this note is not to be paid and the obligation herein expressed shall be null and void." Thereafter, and before the mines had yielded anything, defendant sold them.

(6) In *Parrish* v. *Thurston*, 87 Ind. 437, plaintiff sold to defendant a buggy and harness and received a promissory note signed "E. K. Parrish." There was a man by that name living near Shelbyville, the place where the sale was made, who was wealthy and was known to both parties. The note was really made by E. K. Parrish of Hamilton County, a man entirely unknown to plaintiff. Plaintiff supposed he was getting a note signed by the man from Shelbyville, and the defendant knew that plaintiff believed this. As soon as the plaintiff learned the truth, he tendered back the note and sought to rescind the contract.

(7) In *Blaskower* v. *Steel*, 23 Ore. 106, plaintiff, between the years 1878 and 1885, sold to H a quantity of cigars. On May 18, 1885, there was a credit on the account. What was the effect on the various items of the account beginning in 1878?

(8) *Nolan* v. *Whitney*, 88 N. Y. 648, was an action to recover on a contract for building defendant a house. The defense was nonperformance. The court found that plaintiff had endeavored to live up to the agreement and, acting in good faith, had substantially performed his part. There were some defects in plastering that could easily be remedied.

(9) *Bird* v. *Munroe*, 66 Me. 337, was a case in which a verbal contract was made. The contract belonged to the class required by the Statute of Frauds to be in writing. It was broken, and the parties afterward entered into a written agreement containing the terms of the oral contract. After the writing was signed, an action was brought for breach of the contract which occurred before the written agreement was executed.

(10) *Hurley* v. *Brown*, 98 Mass. 545, was an action to compel defendants to perform their part of the following contract and to convey the land to plaintiff:

$50 LYNN, April 14, 1866.

Received of John and Michael Hurley the sum of fifty dollars in part payment of a house and lot of land situated on Amity Street, Lynn, Mass. The full amount is $1700. This bargain is to be closed within ten days of the date hereof.

This was signed by the parties. The defense claimed that the writing was not sufficient, as there were several houses and lots on the street. It was shown that defendant owned no other house and lot on the same street.

LESSON XVIII

(1) *Kent* v. *Kent*, 62 N. Y. 560, was an action on an oral contract whereby plaintiff agreed to work upon K's farm and to receive his pay after K's death. Plaintiff entered upon such employment, and K died five years thereafter.

(2) In *McCormick* v. *Drummett*, 9 Neb. 384, Z, a stepfather, gave D, his stepson, the use of his farm during Z's lifetime in consideration of D's supporting Z and his wife during their lives. Defense was nonconformity with the requirements of the Statute of Frauds.

(3) In *Collyer* v. *Moulton*, 9 R. I. 90, Moulton and Bromley, copartners, entered into a contract with plaintiff who agreed to build them a wire bending machine. Moulton and Bromley dissolved partnership and Moulton withdrew from the firm, after which plaintiff agreed to release him from the agreement and look to Bromley. Subsequently this action was brought against Moulton on the original contract.

(4) In *Oddy* v. *James*, 48 N. Y. 685, about the

middle of March the parties thereto entered into an oral agreement by which defendant employed plaintiff to superintend his cement works for one year from April 1 next. Plaintiff worked until August 3, when defendant discharged him. Plaintiff sued and defendant set up that the agreement was void under the Statute of Frauds.

(5) In *Woodberry* v. *Warner*, 53 Ark. 488, Woodberry, the owner of a steamboat, employed Warner, a pilot, at a salary of $720 per year, with the further agreement that as soon as the net earnings of the boat should amount to $8000 he should become owner of a one-fourth interest. In about two years, and before the earnings amounted to $8000, Woodberry sold the boat.

(6) In *Boston* v. *Farr*, 148 Pa. St. 220, plaintiff, a physician, brought suit to recover for services rendered defendant's stepson. Defendant said to plaintiff, "Go and get a surgeon and do all you can for the boy; I will see that you get your pay." Did this case come within the Statute of Frauds?

(7) In *Owen* v. *Hall*, 70 Md. 97, at the maturity of a joint promissory note a joint renewal note was given by three makers. After Hall had signed as maker, the other two makers added the words "with interest" to the note without Hall's knowledge or consent.

(8) *Richardson* v. *Robbins*, 124 Mass. 105, was a case in which B agreed to give a mortgage to plaintiff, and the defendant agreed orally to pay the plaintiff

such portions of the mortgage and notes as B should fail to pay.

(9) *Windmuller* v. *Pope*, 107 N. Y. 674, was an action to recover damages for breach of contract. The parties entered into a contract whereby plaintiff sold to defendant 1200 tons of old iron to be delivered at a certain time. Before the time expired defendant notified plaintiff that he would neither receive nor pay for any of the iron. Plaintiff thereupon sold the iron elsewhere and brought this action.

(10) In *Brown* v. *Foster*, 113 Mass. 136, plaintiff expressly agreed to make a suit of clothes for defendant that would be satisfactory to him. The clothes were made and delivered, but defendant declined to accept them. Plaintiff proved that they could easily be altered and made to fit.

(11) In *Smithwick* v. *Shepherd*, 4 Jones (N.C.), 196, Shepherd, who owed plaintiff for board, died. Defendant, his administrator, in a conversation with plaintiff stated that " he would see it paid," or, " it should be paid." Can plaintiff recover?

LESSON XIX

PROPERTY

36. Property in General.
37. Personalty and Realty Distinguished.
38. Fixtures.

36. Property in General. — There are two conceptions of the term property. One is the popular idea that material things are property; the other is the legal idea that the ownership of the material thing is the property interest in it. For our purposes we may define property to be the control which may be legally exercised over a thing having value, by a party called the *owner*. Property may be acquired in four ways: by taking possession of things free in nature; by purchase; by inheritance; and by finding, in cases where no owner of the lost property is found. One who shoots wild game becomes the owner of such game by the first method of acquiring property. He takes possession of that which was existing free in nature. One who purchases the right to the use of a thing secures a property interest by the second method of acquisition. One who is given a thing is said also to secure his property interest in the same manner. When property rights are handed down

from one person to another by will, or according to the laws of inheritance, the property is acquired by the third method.

There are two distinct kinds of property, *personal* and *real*. In connection with both realty and personalty there are two kinds of property interests, *absolute* and *special*. The owner of property has an absolute right in it. One who rents, borrows, or in any other way comes into possession of property for some particular use, has only a special property interest. His rights may be exercised to the exclusion of every one else except the owner, who must on his part respect the special property rights of the other.

37. **Personalty and Realty Distinguished.** — Real property has been defined as land and its appurtenances. It is very difficult to define personalty, and no better idea of this class of property can be obtained than by considering as personal property all things not included under the head of realty. Personal property has been defined as that which may be moved from place to place. This definition is faulty inasmuch as houses, fences, wind-mills, barns, and even sod, earth, and stone may be moved. All these things while appurtenant to the land are considered realty, but when separated from the land may be considered personal property. Land and all things attached to it in a permanent way and intended for use in connection with the land may safely be classified as realty, while those things which may and do

generally attend the person of the owner, and are not intended for use in connection with land, may be classified under the head of personalty.

38. Fixtures. — There is a class of things known as *fixtures* the exact nature of which varies according to conditions. Fixtures include all those things which are attached to realty to be used in connection with it, but the permanency of which is left to be determined by the conditions under which the property is used. For example, A rents a room of B to use as a store. The tenant A puts in counters, showcases, shelves, etc., to be used in carrying on his particular business. While these things are attached to the realty and used in connection with it, they are more intimately associated with the particular business of the tenant and are called fixtures. Whether they belong to the tenant as personal property and can be removed by him, or whether they belong to the owner as permanent additions to the realty, will depend upon the intention of the parties in each case. From the definition, it is evident that fixtures can be called neither real nor personal until the conditions under which they are used are fully understood.

As a general proposition it may be stated that whether or not things used in connection with realty, and known as fixtures, are a part of the realty, or are personalty, depends upon the intention of the parties in any given case. When the intention is made clear by a written contract, there can be no

question as to the classification of the fixtures; but when, as is more often the case, the fixtures are added to the realty without any definite contract between the owner of the realty and the one making the improvements, it becomes a difficult matter to determine what should become of the improvements so made at the expiration of the relation existing between the two parties.

Formerly, the intention was determined very largely by the manner in which the fixtures were attached to the realty. It was arbitrarily held that when shelves, counters, or any other kind of mercantile fixtures were attached to the realty by the use of nails, they were thereby made a part of the realty. When such fixtures were attached by means of screws, it was regularly held that they were considered personalty and would remain the property of the one attaching them as against the claim of the owner of the realty. At present there are three factors that are taken into consideration in settling this question: First, method of attachment; second, relation between the parties; third, the use to which the fixtures are put.

The method of attachment at the present time is not conclusive as to the intention, but merely evidence tending to show what was in the mind of the one attaching the fixtures when the work was done. For example, when the relation of the parties is that of the landlord and tenant and the tenant attaches the fixtures to the realty, it is ridiculous to suppose

that it was his intention to make a permanent improvement to the realty of his landlord, even though the fixtures were nailed to the wall. The use that is to be made of the fixtures further strengthens the inference from the relation of the parties, that it is the intention of the tenant to remove those fixtures at the expiration of his lease.

When the relation between the parties is that of mortgagor and mortgagee and the fixtures are attached by the mortgagor, it is reasonably to be expected that he intended to make those fixtures a permanent part of the realty and the mortgagee may rightfully claim them as a part of the property on which he holds his mortgage.

When the relation between the parties is that of buyer and seller, it is not quite so clear what is the intention of the seller as to fixtures used in connection with the realty. As a general rule, it would be safe to assume that he intended such fixtures to become permanent parts of the realty. Conditions might tend to overcome this inference. It should be stated in this connection, that the purchaser of the realty should be careful to require that his contract of sale includes all those fixtures that may be easily removed by the seller before delivery. This is the only safe method to follow in buying realty where fixtures are concerned.

The tenant must remove fixtures before the term of his lease expires; otherwise, he may be considered a trespasser in attempting to remove them from

property over which he had ceased to have any control.

LESSON XX

39. Cases on Fixtures

(1) In *Hinckley Iron Co.* v. *Black*, 70 Me. 473, plaintiffs entered into possession of a tract of land under a contract with Black, the owner, for its purchase, and erected large and substantial buildings with engines and machinery for manufacturing an extract of bark for tanning purposes. Plaintiffs failed to pay for the land, so never acquired title. This action was brought for the value of the improvements.

(2) *Hendy* v. *Dinkerhoff*, 57 Cal. 3, was an action to recover possession of a steam engine and boiler. One Lampson was in possession of land under a contract to purchase from defendant, the contract providing that in case of failure to purchase, all tools should belong to defendant. Plaintiff later leased an engine and boiler to Lampson, and the agreement was that if Lampson failed to pay, plaintiff might retake them. The engine was built into the masonry so that it could not be removed without destroying the masonry and the wall to which it was affixed.

(3) In *McRea* v. *Central Bank*, 66 N. Y. 489, plaintiff as mortgagee claimed the machinery in a building erected expressly for use as a twine factory. The machinery was heavy and was fastened to the floor by bolts, nails, and cleats and was attached to

the gearing. Most of the machinery could have been removed without material injury to the building and used elsewhere. It was proved that the machinery was put in the building for permanent use.

(4) *Snedeker* v. *Warring*, 12 N. Y. 170, was a case in which the owner of realty, after giving a mortgage, placed on his ground in front of his house a statue of Washington, made by himself, and weighing about three tons. It was on a base three feet high which rested upon a foundation built of mortar and stone. It was not fastened to the base, nor the base to the foundation. Did the mortgage cover the statue?

(5) *Rogers* v. *Crow*, 40 Mo. 91, was a case where the builders of a church left a recess in which an organ was to be placed. The organ was required to complete the design and finish of the building and was attached to the floor and intended to be permanent. Did the organ belong to the realty?

(6) In *Dostal* v. *McCaddon*, 35 Iowa, 318, defendant after his lease had expired entered upon plaintiff's premises to remove a vault and safe he had constructed, and this action was brought to restrain him from removing them.

(7) In *Smith* v. *Whitney*, 147 Mass. 479, the tenant's lease provided that he might erect buildings for manufacturing purposes and remove them within the limit of his lease. He erected a brick engine house complete in itself. The engine and boiler were on a solid foundation of masonry. Could the tenant remove building, engine, and boiler?

LESSON XXI

CONTRACTS FOR THE SALE OF PERSONAL PROPERTY

40. Sale, Barter, and Bailment.
41. Contract to Sell and Contract of Bargain and Sale.
42. How Made.

40. Sale, Barter, and Bailment. — Three important contracts often made in reference to personal property are contracts of bargain and sale, barter, and bailment. A contract of *bargain and sale* is one which transfers the title to personal property in exchange for the purchase price in the form of money or its equivalent.

A contract of *barter* is an exchange of one kind of personal property for another.

A *bailment* contract provides for the transfer of the possession of personal property by the owner, or one having the rightful possession of it, to a second party for some specific purpose upon the condition that it shall be returned or redelivered by the second party upon the completion of the purpose for which the bailment was created. Ordinarily, property so

transferred is returned to the party giving it in exactly the same condition in which it was received, except for the usual wear and tear incident to its use in accordance with the bailment contract. However, it sometimes happens that the identical thing is returned in slightly different form. This does not destroy the nature of the contract. It is a bailment if it can be shown that the parties so intended it. For example, A takes fifty bushels of wheat to the mill and receives from the miller the flour, bran, and middlings made from his wheat. This is a bailment in which the property is returned in a different form from that in which it was received; being the identical property, however, it cannot be classified as a sale or barter.

It is also held that a bailment relation is created when a party delivers grain to a warehouseman who is to store it for him and return an equal number of bushels of the same quality of grain at a time agreed upon by the parties. While the identical grain is not returned, other grain exactly like that which was delivered to the warehouseman is returned to the owner.

41. Contract to Sell and Contract of Bargain and Sale. — Sale contracts are usually referred to as either *executory* or *executed.* Since an executory contract of sale is in reality no sale at all but merely an agreement to sell, it is preferable to consider such an agreement as a contract to sell instead of an actual sale.

An executed sale contract is one in which it is the intention of both parties that the title shall pass immediately, even though certain terms of the contract are yet to be fulfilled. This we call a contract of *bargain and sale*. In general only one who has title to property can sell it and give a good title. Exceptions to this general rule are found in the case of commission merchants and pledgees. It is the custom for owners of certain kinds of goods to ship them to commission merchants to be sold without qualifications as to price or terms of sale. This custom has become so thoroughly fixed that the law will not permit an innocent purchaser from a commission merchant to suffer loss by reason of secret instructions given by the owner to the merchant. For example, A ships a carload of melons to B, a commission merchant, with instructions not to sell them for less than twenty cents each. B does contract to sell these melons to X at eighteen cents each. A cannot recover the melons on the ground that they have been sold contrary to his instructions. Title given by B to X is good, even though it was given in violation of specific instructions.

A pledgee is one to whom personal property has been given as security for the payment of a debt or the performance of some other obligation. A pledgee may sell the property at the expiration of the pledge period, provided the pledgor has failed to perform his obligation, and give a good title although at the time he sells he has no absolute title himself. This

power to sell may be secured to the pledgee by the terms of his contract with the pledgor, or may be implied from the circumstances of the transaction.

42. How Made. — In general it may be said that no restrictions are made in the matter of making contracts for the sale of personal property. The seventeenth section of the Statute of Frauds requires that certain formalities be complied with in order to enable one to bring an action in a court of law to enforce a contract to sell. It should be remembered that when these formalities are not complied with, the contract is not necessarily void, but it cannot be the subject of an action at law. It may be thought at first that this is the same in effect as rendering it void, but it will be seen that such is not the case. If it were made void, no subsequent act could give it validity, but under the present law the lack of necessary formality may be corrected by subsequent acts of the parties. Part payment, or part delivery, or a note or memorandum may be made after the contract has been entered into.

LESSON XXII

SALES — CONTINUED

43. SALE OF GOODS ACT.

43. Seventeenth Section of the Statute of Frauds. — This English statute provides:

"No contract for the sale of goods, wares, and merchandise, for the price of ten pounds sterling, or upwards, shall be allowed to be good except

1. The buyer shall accept part of the goods so sold, and actually receive the same; or

2. Give something in earnest to bind the bargain, or in part payment; or

3. That some note or memorandum in writing of the said bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized."

This section has been reënacted in most of the states. The amount involved necessary to bring the contract within the statute varies in the different states, from $30 to $200. As will be seen, the statute includes most of the articles regarded as personal property under the terms "goods, wares, and merchandise." A close question comes up when the goods are in process of manufacture. If it is held that it is a sale of labor and of material to be made up, it is not a sale of goods, wares, and merchandise, but a contract for "services, skill, and materials," and does not come within the statute.

English Rule. — The English rule for determining whether a given contract is for "goods, wares, and merchandise" or for "services, materials, and skill" is that if the thing contracted for in its deliverable shape could be properly classified as "goods, wares,

and merchandise," then the contract comes under the statute.

Massachusetts Rule. — The Massachusetts rule for determining whether a contract to sell exists under the statute or not, is that if the goods to be delivered are of the kind regularly manufactured by the seller, the contract comes under the statute, but if the goods manufactured are made after specifications that peculiarly fit them for the uses of the buyer, the contract does not come under the statute. In all other respects the Massachusetts rule is the same as the English rule.

New York Rule. — Until 1911 there was another rule, known as the New York rule, which provided that contracts for articles to be manufactured did not come under the statute, but that if the thing contracted for was in existence at the time the contract was made, the contract was for the sale of " goods, wares, and merchandise," even though important work remained to be done upon the thing sold. This rule has been changed by statute in New York. Several states have followed the New York rule, and properly to understand the law in these states it is necessary to explain the former New York rule. The present New York rule corresponds with that of Massachusetts.

For ordinary purposes, " goods, wares, and merchandise " may be considered to include all kinds of personal property.

Natural products of the soil such as trees are con-

sidered real property, and come under the seventeenth section of the Statute of Frauds only when they are to be severed from the soil by the seller. If they are to be severed by the buyer they come under the fourth section of the Statute of Frauds as they are considered an interest in or concerning real property.

It should be understood that the seventeenth section of the Statute of Frauds does not absolutely require that the contract to sell be in writing. When a partial or complete delivery has been made, or when a partial or full payment has been accepted, no writing is necessary. When there has been neither payment nor delivery, it is only necessary that there be some written memorandum tending to show that a contract to sell was entered into. This memorandum must be signed by the party against whom an action is brought, and must give such information regarding the contract that there can be no question as to its existence and terms. For example, A and B enter into an oral contract whereby A contracts to sell a horse to B for $150. Later A writes B asking him to confirm their oral contract. B in reply writes a letter in which he states that he has bought the horse of A for $150. This letter will be a sufficient note or memorandum to satisfy the Statute of Frauds.

To satisfy the requirement that a part or all of the goods should be delivered, the goods must be actually accepted by the buyer in conformity with the terms of the contract. A buyer who has ac-

cepted the goods for the purpose of examining them cannot be deemed to have accepted them within the meaning of the statute. After he has examined them and either signified his approval or permitted a reasonable time to elapse, he is said to have accepted the goods and a legal delivery has taken place. Delivery of specific goods to an agent designated by the buyer is sufficient.

There is sometimes what is known as a *constructive* delivery of the goods. For example, A sells to B a thousand bushels of wheat which he has stored in a certain warehouse. A constructive delivery takes place when A hands B the key to the warehouse, or delivers a warehouse receipt.

Earnest money is a payment which is made to bind the bargain but which is not considered a part of the purchase price. A part payment may be made at the time the contract is entered into, or subsequently. It may even consist of canceling an old indebtedness. Earnest money is rarely given at the present time. When any amount is advanced, it is understood to be a part of the purchase price, unless there is a definite agreement to the contrary.

LESSON XXIII

SALES — Continued

44. Potential Existence.
45. Passing of Title.

44. Potential Existence. — Only things that are in existence at the time of making the contract can be the subject matter of a sale. There is an apparent exception to this rule in the case of property not yet in actual existence but having what is known as potential existence. Things that are in potential existence may be dealt with as though they were in actual existence at the time of entering into a contract concerning them.

Things are in potential existence when they will come into being without human aid. For example, a wheat crop growing in the field is in potential existence, because if left alone it will mature in due time. A crop not yet planted cannot be said to be in potential existence, because human agency is required to bring it into being. A growing crop may be the subject of sale or mortgage, but an unplanted crop may not be sold or mortgaged.

45. Passing of Title. — One of the important questions in connection with the sale of personal property is the question of when the title to the property actually passes from the seller to the buyer. When property is destroyed between the time of entering into

the contract and the time of delivering the property, the question of passing of title becomes important as it determines upon whom the loss will fall. As a general rule it may be stated that the title will pass at the time when it is intended by both parties to the transaction that it shall pass. It is sometimes difficult to determine just what the intention of the parties is.

When the contract is a bargain and sale of specific property, the title passes at the time the contract is made. As a contract to sell is merely a promise to sell at a later date, the title does not pass until an actual sale is made.

When the contract is for the sale of specific goods and the seller, according to the contract, is required to do something to the goods in order to prepare them for delivery, the title does not pass until the seller has performed his task. This rule will be followed, unless it appears from satisfactory evidence that there was a different intention in the minds of both parties.

When specific goods are sold, and it is agreed that they are to be measured or weighed by the seller before delivery for the purpose of determining what the price shall be, the title does not pass until the goods have been weighed or measured in accordance with the agreement. In many states it is also held that if the act of weighing, etc., is to be performed by the buyer the same rule will apply. In New York state title passes immediately in either case.

It is sometimes provided in the contract of sale that the title shall not pass until the price agreed upon is paid. Such payment or a satisfactory arrangement regarding future payment is usually a condition precedent to the passing of title. This condition may exist even in cases where the goods are delivered at the time the contract is made. An illustration is found in installment sales. When goods are sold on the installment plan, they are delivered to the buyer, but it is expressly agreed that the title shall not pass until final payment has been made.

Goods are sometimes sold on approval, and in such cases, unless it is provided otherwise, the title passes when the buyer has communicated his approval to the seller, or at the expiration of the time agreed upon by the parties; or, in the event of no agreement regarding the time, at the expiration of a reasonable time.

In some cases goods are sold with the understanding that they are to become the property of the buyer at once, but that he shall have the privilege of returning them at a stated future time if he desires to do so. In such cases the title passes, but reverts to the seller if the buyer chooses to exercise his right of return.

We have been discussing the passing of title in contracts for the sale of specific goods. We shall now consider the question of transfer of title in sales of goods that are not specific.

Unless a different intention is shown to exist, it

will be understood that in the sale of goods not yet identified the title shall not pass until identification is made.

When the contract is for the sale of unidentified property of a kind where the value of each unit is not uniform, there is no passing of title until definite identification is made. For example, A buys ten cows out of a herd of twenty and agrees to come for them the following day. There is no passing of title until selection of the ten is made. If at the time the contract was entered into A had placed his mark on each of ten cows, the title to each of these ten would pass, notwithstanding the fact that they were left in the possession of the seller.

It is generally held that in the sale of a part of a quantity of goods, where the value of each unit is the same, the title will pass unless it is provided otherwise before an actual selection of the goods is made. For example, A buys fifty bushels of wheat of B and it is agreed that on the following day fifty bushels will be taken from a bin containing one thousand bushels of uniform grade. In this case the title passes immediately unless there is convincing evidence of a contrary intention.

In the case of goods in which the value of different units varies, an appropriation of any unit to the purposes of the contract can only be made by a selection that meets the approval of both buyer and seller, unless the selection of the unit has been left to one party by agreement.

An appropriation is said to be complete when the party having authority to select performs some act in connection with the goods which would be improper until the actual appropriation had been made. When the seller turns over the goods to a carrier to be delivered to the buyer, the appropriation is made unless the seller reserves the right to recall them. It is assumed that the carrier is the agent of the buyer and not of the seller. For example, when A orders goods of B and agrees to pay the freight, they may be said to be appropriated when they are delivered to the carrier. There is some difference of opinion regarding the question of appropriation when the shipment is made C.O.D. When the seller pays the freight the carrier is his agent, and there is no delivery until the goods have left the hands of the carrier.

A *chattel mortgage* is a conditional sale of personal property in which the title passes at once with the understanding that it shall revert to the original owner in case the mortgagor shall pay, or cause to be paid, a certain amount contracted for in a collateral undertaking. In this case the possession remains in the mortgagor, but the title passes to the mortgagee upon the condition stated.

In New York state it is held that the mortgagee has a special property in the thing mortgaged, but that title does not vest in him until default in payment of the principal debt which the mortgage was given to secure.

LESSON XXIV

SALES — Continued

46. Warranties.

46. Warranties. — In the sale of personal property there may be, in addition to certain conditions, warranties either expressed or implied. A *warranty* is an agreement regarding the goods which are the subject of the contract, but collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages only. A separate consideration is not required for the warranty, unless it was made after the principal contract. In the sale of goods where there are conditions precedent, the title does not pass until the conditions are fulfilled. Goods sold subject to trial illustrate this kind of condition. Where there are conditions subsequent the title passes, but reverts to the seller upon the fulfillment of certain conditions. A chattel mortgage illustrates this kind of condition. In the case of warranties the title passes immediately, if it be the intention of the parties. The remedy for a breach of warranty is an action for damages.

When goods are sold from a sample, there is an implied warranty that they are equal to the sample in quality and are of the exact kind represented by the sample.

When a buyer orders goods to be made for a specific purpose, there is an implied warranty that they will

be suited to the purpose for which they were ordered. There is a further implied warranty in the case of all manufactured goods, that the goods are free from latent defects. Retailers do not warrant impliedly that goods sold by them are free from latent defects, as they have no better opportunity to examine the goods than has the buyer. When selling food direct to the consumer, retailers impliedly warrant it is fit for consumption. The manufacturer, however, is supposed to know whether there are defects in the workmanship that tend to render the goods unfit for the uses that are to be made of them.

There may be any number of express warranties in connection with a sale and, when express warranties are made regarding the quality of the thing sold, caveat emptor does not apply as to the qualities warranted. In all cases where the goods are inspected by the buyer and his judgment as to the quality and kind is relied upon by him, there is no implied warranty either as to the quality or kind. If the goods are not what the buyer thinks they are, he has no remedy against the seller. When the goods are purchased, a buyer who has not sufficient expert knowledge to enable him to judge regarding the quality and quantity, should require a warranty as to the thing about which he is in doubt.

In determining whether or not there has been an express warranty, much latitude is allowed for what is known as "dealer's talk." One may say, for example, "this is the best machine of its kind in the

world," or, "this machine runs so easily that it will run alone." Such expressions cannot be considered warranties.

Any statement which is clearly an expression of opinion rather than a statement of fact cannot be considered a warranty. One who says, " If you buy this horse now and keep him until December, you will be able to sell him for 50 per cent more than I am asking you for him," is not making a statement of fact capable of proof, but is merely giving an opinion regarding the matter.

Remedies for Breach. — In all cases where there is a breach of warranty the defaulting party is liable to an action for damages. If, however, the title to the property has passed, the buyer must keep it.

When the title to the goods has not passed and the buyer refuses to accept them when they are properly offered by the seller, the latter may sell them to another party and bring an action against the first buyer for the damages which will be the difference between the contract price and the actual selling price plus any expense that may have been incurred in making the second sale; or, the seller may store the goods at the risk of the buyer and bring an action for the contract price plus any necessary expenses; or, in the case of goods that have a market value, the seller may retain the goods and sue the buyer for the difference between the contract price and the market price. In all such cases only actual damage can be recovered. When the seller sustains no dam-

age by reason of the failure of the buyer to accept the goods, the seller cannot recover in an action at law.

In cases where the seller refuses to deliver in accordance with his contract, the buyer may purchase similar property elsewhere and sue the defaulting seller for the difference between the contract price and what he was obliged to pay for the goods purchased; or, the buyer may sue the seller for the difference between the contract price and the market price in the case of goods that have a market value. Specific performance will occasionally be ordered by a Court of Equity when a seller refuses to deliver property to the buyer. This decree will be granted only when the peculiar nature of the property sold makes it impossible to do justice by giving damage in money. For example, A buys from B an old piece of furniture that belonged to George Washington. It will readily be seen that the chief value of this property lies in the fact that it was once the property of George Washington and not in the utility which it possesses. No other piece of furniture can be bought that will take its place, and the only way in which justice can be done the buyer is to require the seller to deliver the specific piece of furniture to him. In cases where the title has actually passed and the property has been delivered, the only remedy which the seller has against the buyer who refuses to pay for the property is an action for the contract price, or for the reasonable value of the goods when no contract price has been agreed upon.

Stoppage in Transitu.— It sometimes happens that the seller, after shipping goods to a buyer, learns that the latter is insolvent. Upon the receipt of such information the seller may notify the carrier, in whose hands the goods are, not to deliver them to the buyer, but to hold them subject to the seller's orders. The right to do this is called *stoppage in transitu.* In exercising this right the seller should be sure that the buyer is insolvent at the time he stops the delivery of the goods. If the information upon which the seller bases his action is incorrect, he renders himself liable for any damage which the buyer may sustain as the result of his action.

Seller's Lien.— This is the right which an unpaid seller has to retain goods until they are paid for. The right can be exercised only upon the following conditions: First, the seller must be unpaid in whole or in part. Second, he must be in possession of all or part of the goods. Third, the term of credit, if any, must have expired, or the buyer must have become insolvent. Fourth, title to the goods must have passed to the buyer.

The right may be exercised upon any of the goods in the seller's possession and they may be retained for the non-payment of any part of the purchase price. However, the lien does not exist for any debt of the buyer to the seller, other than the purchase price of the particular goods upon which the lien is claimed. The lien is favored by the courts and the conditions usually interpreted in favor of the seller.

LESSON XXV

47. Cases on Sales of Personal Property.

(1) *Shields* v. *Pettee*, 4 N. Y. 122. — This action was based upon a contract between Pettee and Thomas Ingham, for the plaintiff. The only writing was in the form of a memorandum as follows :

> New York, July 19, 1847. Sold for Messrs. George W. Shields & Co., to Messrs. Pettee & Mann, 150 tons Gartsherrie pig iron, No. 1, at $29 per ton, one-half at six months, one-half cash, less four per cent, on board "Siddons."
>
> Thomas Ingham, Broker.

At the time this memorandum was made and the contract referred to was entered into, the ship "Siddons" was known by both parties to be at sea. Later, the boat arrived, and the iron was tendered to the defendants. They inspected the iron and found it was not Gartsherrie pig iron No. 1, and they refused to accept or pay for it. This action was brought to recover damages for such refusal.

(2) *Eggleston* v. *Lingham*, 27 Mich. 324. — Lingham bought from C. Eggleston all the pine lumber in Eggleston's yard at Birch Run at prices varying according to the quality and kind of lumber. Terms were set forth in a contract signed by both Lingham and Eggleston. The contract contained a provision that the lumber was to be delivered by Eggleston on board of cars when requested by Lingham, which

request should not be made later than the 10th of the following November. There was no provision in the contract as to the method of determining the quality and kind of lumber.

A part of the money was paid at the time the contract was entered into. A part of the lumber was loaded a few days later, both Lingham and Eggleston being present and agreeing upon the number of pieces loaded and further that the measurement of these pieces should be made later. At this time there was a disagreement between the two parties as to whether they had fixed upon a person to inspect the lumber. No further deliveries were made, and on the 9th day of October there were forest fires raging near Birch Run, and Lingham told Eggleston that he had better load several cars of the lumber and have it inspected as it was unloaded. Eggleston went to Birch Run, but when he arrived there the lumber was entirely surrounded by fire and was soon destroyed. Eggleston maintained that the title had passed and brought an action against Lingham to recover the purchase price of the lumber.

(3) *Goddard* v. *Binney*, 115 Mass. 450.—In this case, the plaintiff entered into a contract with Binney, in which the former was to manufacture for the latter a buggy according to certain specifications, including the purchaser's monogram on the side. After the carriage had been completed, and notice had been given to the defendant to come and take it away, the carriage factory burned, and the buggy was

destroyed. It was shown that the purchaser not only had been notified that the buggy was ready for delivery, but had asked the maker to give him a little more time in which to pay for it and take it away. He had also requested the maker not to sell it, but to hold it for him. This action was brought to recover the purchase price.

(4) *Rochester Distilling Co.* v. *Rasey*, 142 N.Y. 570.— In this case it appeared that a man by the name of Lovell, who had rented certain farm lands, gave to one Page a chattel mortgage on all his corn, potatoes, oats, and beans which were then planted and to be planted the next year. At the time the chattel mortgage was given only a part of the potatoes were planted and none of the beans. Several months later the Rochester Distilling Co. brought an action against Lovell and secured a judgment. The sheriff levied upon the growing crops and sold them at public sale to the Rochester Distilling Co.

Later, Page, who held the chattel mortgage on these crops, foreclosed his mortgage and sold the crops under foreclosure to Rasey, who took possession of the crops, and this action was brought by the Rochester Distilling Co. to recover possession of them.

(5) *Groat* v. *Gile*, 51 N. Y. 431.—Gile owned a flock of sheep. Groat, a buyer, after looking at the sheep, offered Gile $4 apiece for all of them except two. Gile had stated that there were *about* a certain number of sheep and lambs. He did not know the

exact number. It was agreed that the lambs should be left in the care of Gile until the middle of the following September and the old sheep until the first of November. Nothing was said about the wool on the sheep. Between the time of entering into the contract and the time of making the delivery, Gile clipped the wool from the sheep and sold it. This action was brought to recover the value of the wool.

(6) *Mount* v. *Wolcott*, 36 N. J. L. 262. — Wolcott, a merchant, was asked by Mount for early strap-leaf, red-top turnip seed, and Wolcott showed him and sold him seed which Wolcott said was early strap-leaf, red-top turnip seed. Mount explained at the time he purchased this seed that it was an early variety, very much in demand in New York City, and that he was in the habit of raising it for the early New York market.

The seed was sown upon ground prepared by Mount, and when the crop matured it proved to be Red-Russia turnip, which was good only for cattle, and unsalable in the market. This action was brought by Mount against Wolcott for damages. The evidence proved conclusively that Wolcott did not know that the turnip seed which he sold was not what he represented it to be. He bought it for early strap-leaf, red-top turnip, and sold it under the same name. It was impossible to discover by an examination of the seed whether it was one kind or the other.

(7) *Hurff* v. *Hires*, 40 N. J. L. 581. — Hurff bought of one Heritage two hundred bushels of corn, out of a

lot of four or five hundred bushels which Heritage had in his crib. He inspected and approved of the corn before it was bought, and paid cash for it immediately. It was arranged between Hurff and Heritage that the corn should be left where it was until it got hard enough to keep well in bulk, and then Heritage was to deliver it. Later, Hiers, a sheriff in the county of Salem, having an execution against Heritage, levied on the entire quantity of corn. After this levy was made, Heritage delivered two hundred bushels of the corn to Hurff, whereupon sheriff Hiers brought an action against Hurff to recover the corn.

(8) *White* v. *Oakes*, 88 Me. 367.—Oakes was a furniture dealer, and sold a folding bed to White. At the time of the sale there was no expressed warranty of any kind. The bed proved to be dangerous to persons using it, not because it was defective in manufacture, but because the design was faulty. The bed, upon being used, closed up and injured a man sleeping in it so that he became partially paralyzed. The furniture dealer, Oakes, was not aware of this danger. This action was brought by the owner against the dealer for damages.

(9) *Dinsmore* v. *Barker*, 72 Pa. St. 427.—A man who claimed to be the agent of Barker & Co., but who had no connection with the firm, came to Dinsmore and purchased his wool for Barker & Co. A memorandum was given on a business card of Barker & Co., and Dinsmore was told to ship the wool to

them and to call at their office to pay. The wool was shipped as directed, but was delivered by the carrier to the man who had represented himself to be the agent of Barker & Co. He, the agent, then sold the goods to Barker & Co. as his own, and received payment therefor. Later, Dinsmore went to Barker & Co. for the amount due from them in accordance with their supposed contract, and Barker & Co. refused to pay, whereupon Dinsmore brought an action against Barker & Co. to recover the goods.

LESSON XXVI

(1) *Symns* v. *Schotten*, 35 Kan. 310.—Schotten sold goods to the Emporia Mercantile Association. The goods were sold on credit and were shipped by freight. They had reached Emporia, the city in which the Emporia Mercantile Association did business, and were stored in the warehouse of the railroad company. While they were in the warehouse, Schotten learned of the bankruptcy of the Emporia Mercantile Association, and notified the railroad company to hold the goods subject to his order. Symns, representing the Emporia Mercantile Association, brings this action to determine whether Schotten had the right to stop the delivery of the goods.

(2) *Hyde* v. *Cookson*, 21 Barb. (N. Y.) 92.—Plaintiff and one Osborn entered into an agreement

whereby plaintiff furnished certain hides to Osborn, who took them to his tannery and manufactured them into sole leather, and was to return them to plaintiff in New York. Plaintiff was then to sell them at his discretion, and when sold the net proceeds, less costs, commissions of plaintiff, expenses, etc., were to go to Osborn for tanning. If there was any loss, Osborn was to stand it. Osborn failed before the contract was completed, and assigned to defendant. Defendant refused to deliver the hides to plaintiff, claiming it was a sale and the title was in Osborn.

(3) *Dexter* v. *Norton*, 47 N. Y. 62. — This was an action to recover damages for breach of a contract by defendant to sell and deliver to plaintiff 621 bales of cotton bearing certain marks and numbers specified in the contract at a certain price. After defendant had delivered 460 bales, the remaining 161 bales were destroyed by fire without fault or negligence of the defendant.

(4) *Nixon* v. *Brown*, 57 N. H. 34. — Plaintiff employed one M to purchase a horse for him. M bought the horse, paid for it with plaintiff's money, and took the bill of sale in his own name. He afterwards informed the plaintiff of what he had done and showed him the bill of sale, but plaintiff allowed him to go away with the horse and the bill of sale. M went to the defendant, who had no knowledge of the agency, showed him the bill of sale and sold him the horse. Suit was brought to recover the horse.

(5) *McConihe* v. *New York & Erie Railroad*, 20 N. Y. 495. — This was an action to recover damages upon a contract under which plaintiff was to furnish material and build fifteen lumber cars for the defendant at $475 per car, to be paid six months from the date of delivery. The defendants were to furnish iron boxes for the cars of a model made by them. When the cars were completed, excepting the part prevented by the default of the defendants in not furnishing the boxes, they were destroyed by fire while in the possession of plaintiff and without his fault.

(6) *Graff* v. *Foster*, 67 Mo. 512. — Defendant bought some oranges of plaintiff, to be like samples exhibited by plaintiff. In an action for the purchase price, defendant proved that the oranges were greatly inferior in quality to sample, and set up breach of the implied warranty.

(7) *Rodgers* v. *Niles*, 11 Ohio St. 48. — Niles agreed with the plaintiff, Rodgers, that he would deliver to him at a future time three steam boilers with which to run the engines in his roller mill. After the delivery, it was shown that there were certain defects in the material which were unknown to either the buyer or seller. This action was brought to recover damages from the manufacturer.

(8) *Huntingdon* v. *Hall*, 36 Me. 501. — Defendant sold plaintiff a small house which was on another man's land and not occupied by defendant. There was no express warranty of title. This action was

brought to recover damages on an implied warranty of title, as defendant did not own the house.

(9) *Tabor* v. *Peters*, 74 Ala. 90. — The defendant, who was a manufacturer of churns, contracted with the plaintiff to furnish him a quantity of churns. No express warranty regarding the quality of the churns was given. The plaintiff found, upon trial, that they were worthless and brought this action against the manufacturer for damages.

LESSON XXVII

(1) *Hunter* v. *McLaughlin*, 43 Ind. 38. — McLaughlin sold a patent right in a ditching machine to the plaintiff, and at the time of the sale exhibited the letters patent and a model of the machine. He also stated that, if properly constructed, the machine would work well. The plaintiff proved that he had constructed a machine in accordance with the specifications and that it did not work well. No evidence was introduced to show that McLaughlin had ever made or used a machine built after this model. There was no evidence tending to show that he had represented that he had made or used one. This action was brought by Hunter to recover damages upon a breach of warranty.

(2) *Stroud* v. *Pierce*, 6 Allen (Mass.), 413. — The defendant sold a piano to the plaintiff and stated at the time of the sale that the instrument is " Well

made and will stand up to concert pitch." It was proven by the plaintiff that it would not stand up to concert pitch, and this action was brought to recover damages for a breach of warranty.

(3) *Pritchard* v. *Fox*, 4 Jones Law (N. C.), 140.—Fox sold a soda fountain to Pritchard and stated at the time of the sale that it was in good condition. There were, however, inherent defects in construction that caused it to get out of order from time to time. These defects existed at the time of the sale, but were not known to the seller. This action was brought upon a breach of warranty.

(4) *Frazier* v. *Harvey*, 34 Conn. 469.—Harvey sold some hogs to the plaintiff. It afterward appeared that, unknown to both parties, the hogs had a disease which later caused their death. This action was brought against Harvey on an implied warranty of soundness of the hogs. Frazier bought the hogs to resell.

(5) *Mottram* v. *Heyer*, 5 Denio (N. Y.), 629.—The plaintiff sold goods to the defendants, and after the goods had been delivered to the custom house and the bills of lading had been given to the defendants, the plaintiff, learning of the insolvency of the defendants, notified them to hold the goods subject to the plaintiff's orders. It was the intention of the plaintiffs to exercise their right of *stoppage in transitu*. Upon the failure of the defendants to hold the goods as requested by the plaintiff, this action was brought to recover damages.

(6) *Jones* v. *Earl*, 37 Cal. 630. — The plaintiff had delivered goods to the defendant to be transported to a designated consignee. While the carrier was in possession of the goods, the plaintiff delivered to his agent a letter stating that the consignee had become insolvent and that he, the plaintiff, desired to save the goods which were then in the carrier's hands. A bill of particulars was given to the agent describing the goods, and the agent was directed to deliver them to no one but the plaintiff's agent, who would be at their destination to look after them. Upon the failure of the carrier to hold the goods as ordered, this action was brought for damages.

(7) *McRea* v. *Merrifield*, 48 Ark. 160. — The plaintiff sold an engine, sawmill, and a lot of tools to a certain person under a contract of sale which expressly stated that the title was to remain in the plaintiff until the purchase price was fully paid. It was shown that the payment was never fully made. The defendant bought the goods from the original vendee and this action was brought to recover the property on the ground that the title had not yet passed from McRea, the plaintiff in this case.

(8) *Treasurer* v. *Commercial Mining Co.*, 23 Cal. 390. — The defendants had contracted to deliver to the plaintiff forty-six shares of its capital stock. Upon their refusal to do so, this action was brought to compel specific performance. At the trial it was shown that the stock had no fixed market value and that, owing to much fluctuation in the value

of the stock, it would be impossible to ascertain the exact damage arising from the breach of contract on the part of the defendants.

(9) *Terry* v. *Wheeler*, 25 N.Y. 520. — The plaintiff bought certain lumber of the defendant. At the time of the purchase, the lumber was in defendant's yard. The pieces sold were designated and the price was paid, but it was agreed that the vendor should deliver the lumber at the railroad station. Before such delivery was made, the lumber was destroyed by fire through no fault of the defendant. Upon the defendant's refusal to deliver the lumber this action was brought to recover the purchase price.

LESSON XXVIII

REAL PROPERTY CONTRACTS

48. Real Property in General.
49. Corporeal and Incorporeal Real Property.

48. Real Property in General. — In the lesson on property, real property was defined as land and its appurtenances and personal property was said to be all other kinds. For all practical purposes this distinction is sufficient. It is commonly stated that he who owns land in fee has an absolute right in that land and in all that is above or below it.

An interesting question in connection with real property is one that has to do with the right of owners of real property to the water remaining on or passing through their land. In general it may be said that one who owns the land surrounding still water has absolute control of that water. He has the exclusive right to fish in or to cut ice upon water surrounded by his land. In the case of non-navigable running water he has the exclusive right to use as much of the water as might be necessary for ordinary purposes such as household use, watering stock, and

for irrigation purposes, providing the water used for irrigation is returned to its natural channel. A miller may use the water power of a stream so long as he does not divert the water used from its natural channel so as to interfere with the rights of those who own property adjoining the stream below the mill.

In the case of navigable streams the state owns the land under the water and all land on either side to high-water mark. Where a navigable stream separates two states, the thread of the stream is the boundary between them. Any person may fish in navigable water and may cut ice and appropriate it to his own use so long as he does not interfere with the rights of owners of real property on either bank of the stream. The only exclusive rights to the use of the navigable stream, that are possessed by adjoining landowners, is the right to erect piers for their own exclusive use so long as those piers do not interfere with the right of the public to use the stream for navigation.

Subterranean streams of water cannot be controlled by owners of surface rights. For example, A drills a well upon his property and a large flow of water results. Later the owner of adjacent land drills a well in his property and, striking the same subterranean stream, diverts the water from A's well to his own. A has no redress.

A distinction is made between products of the soil that are the result of annual labor, such as wheat and other grains, and natural products of the soil

such as grass, trees, etc. Those that are the result of annual labor are known as *fructus industriales* and those that grow naturally from the soil are known as *fructus naturalis*. The second class of products are always considered real property when attached to the soil, and cannot be changed into personalty without being severed from the land. When standing trees are sold and it is agreed that the buyer is to cut and remove them, he has bargained for an interest in realty, but when they are to be cut and delivered by the seller, they are considered personal property. The annual crops that result from sowing or planting are considered personal property even while attached to the soil, and may be the subject of sale or mortgage as such.

The question of fixtures as real property has been discussed in the preceding lessons on personalty.

49. Corporeal and Incorporeal Real Property. — Real property may be divided into two kinds known as *corporeal* and *incorporeal*. Corporeal real property is all tangible property that can be classified as real: trees, land, houses attached to land, and all kinds of real property that are susceptible to the senses may be classified under this head.

There is a kind of real property that is intangible, but is, nevertheless, an interest in land. This is known as incorporeal real property and consists of rights exercised by one person over the land of another. These rights are called *easements*. For example, it is frequently provided in deeds to city

real estate that only buildings of a certain kind, or of a certain value or size, shall be built on the land conveyed by the deed. Or, it may be provided that the purchaser shall not build within a stipulated number of feet from the street. Such provisions, commonly called restrictions, may be enforced by the seller, who thus has an easement or right over land belonging to another person. Another form of easement, more common in the country, is the right of one person to pass over the land of another. This is called a right of way. This right, or easement, may be created in several ways: by grant, by implication, or by prescription. If A owned a piece of property, he might grant to B a particular right of way over it. If A should sell B a piece of land entirely surrounded by A's land, B would have a "right of way by necessity," as it is assumed that B would not have bought the land without the right to go across A's land to reach it. The right might have been given in A's deed to B. It has also been held that when one has used a right of way over another's land for many years without interruption, he has acquired a right of way by prescription, and the owner of the land cannot set aside this right. The owner of land subject to a right of way is not required to keep the way passable or to do anything except allow the owner of the right peaceable use of it.

Easements may be granted perpetually or only for a limited period of time.

LESSON XXIX

REAL PROPERTY — Continued

50. Estates in Land.

50. Estates in Land. — The largest estate which one may have in realty is an estate in *fee simple*. Such an estate amounts to absolute ownership of the property except for any easements that may have been created, the right of the state to levy taxes against it, the right of creditors to have it sold to satisfy their claims when the owner is in default, and the right of *eminent domain*. This right of eminent domain is the right of the state or United States to condemn and take private property for public use upon the payment of a reasonable price therefor, when the public good requires that such private property be taken in condemnation proceedings. This right is often exercised by public service corporations under authority from the state.

If the taxes are not paid, the state has the right to take the property and sell it at public auction to secure funds with which to pay the state claim.

One who owns real property and does not pay his debts may be sued in a court of law, and upon proof that the claim is just, a judgment will be given the creditor. This judgment may be satisfied by seizing the real property of the debtor and having it sold for the benefit of the creditor.

The estate in real property next in importance to fee simple is an *estate for life*. In this estate possession and use of the property are given the person called the *life tenant* during his natural life, with a vested interest in the remainder after the life estate, which together are equivalent to an estate in fee simple. At the death of the life tenant the possession of the property either reverts to the original owner or his heirs, or becomes vested in some one else whom he has named. An estate for life is created by contract, by will, or by operation of law. Estates that result from operation of law are known as *curtesy* and *dower* estates.

When a husband dies leaving real property, his wife has a dower interest in it. By the common law she is entitled to the use for life of one third of all the realty which he owned at the time of his death, or which he had owned at any time during their marriage and in the conveyance of which she did not join. This right cannot be defeated by any act of the husband, nor by a wife's contract with her husband. If he makes a will, he can dispose of only two thirds of his real property or the whole subject to his wife's right of dower; or, he can make a provision for his wife in lieu of dower, and she may elect between this provision and her dower right.

When the wife dies, her surviving husband has the life use of all the real property which she owned at the time of her death and which she did not dispose of by will, providing a child has been born capable of

inheriting the property. The curtesy right is more extensive than the dower right, in that it applies to all the wife's realty, but the former is dependent on two conditions, absence of a will disposing of the property, and the birth of an heir. The dower right is an unconditional right which cannot be defeated by any act of the husband.

Since the duration of a life estate is indefinite, the law provides that the heirs of the deceased life tenant shall have the right to harvest crops or to have any other profits that may result from the labor of the life tenant. Such crops or other profits are known as *emblements*. In case the life tenant voluntarily brings his tenancy to a close before his death, his representatives cannot claim emblements.

Any act of the life tenant that diminishes the permanent value of the estate which will pass to the remainder-man is considered *waste*, and renders the life tenant liable to an injunction and damages.

In nearly all states there has been passed what is called the *Homestead Act*, which provides that one having a near relative such as mother, father, or wife dependent upon him for support, may set aside, in accordance with the law, a home of a certain valuation as a homestead. When this is done according to the requirements of the law in any state, the home may not be taken to satisfy claims of creditors even when a judgment has been secured against the one owning the homestead. A debtor becomes exempt from the payment of his debts to the extent

of the homestead that has been set aside for the benefit of those dependent on him. Such a law is not unjust since the public is notified that the particular home in question is exempt.

LESSON XXX

ESTATES IN LAND — CONTINUED

The next lower estate than an estate for life is an *estate for years*. Such an estate is one which is to continue for any given period of time. It may be for a day, a month, a year, or any number of years, providing the term is definite. The most common form of an estate for years is the one created by lease. In this kind of an estate the owner, called the *landlord*, leases his property to the lessee, called the *tenant*, for a period of time stipulated in the lease. The property right of a tenant under a lease is considered personal property. In general, leases must conform to the Statute of Frauds. If they are not to be completed within the space of one year from the date of making, there must be written evidence to support them in order to make them enforceable in a court of law. In New York state, however, it has been specially provided by statute that a lease for one year may be made orally, even if it is not to begin to run until after the date of making. This is an exception to the general rule.

The landlord usually is expected to pay the taxes

and in every way protect the tenant in his right to use the premises. The tenant is expected to make repairs with the exception of those which are made necessary by natural wear and tear. He is expected to make only such use of the premises as was intended at the time of making the lease. If he rents to use for agricultural purposes, he is not entitled to quarry or mine minerals on the property. If a quarry has been opened and was being operated by the landlord, either the tenant for years or the tenant for life would be entitled to continue the operation of such quarry or mine. No new quarry or mine could be opened. It is usually understood that timber standing on the property may be cut by a tenant for life or for years for use on the premises. It may be used for fuel, to repair the buildings or fences, or to make farm implements, but cannot be sold off the farm.

The landlord does not impliedly warrant that the premises are in a tenantable condition. Neither can there be any implied warranty that the property is suitable for the purpose for which it is rented. If the tenant desires assurance on either of these two points, he must insist that the landlord include express warranties in the lease.

The tenant agrees to return the premises at the expiration of his lease in as good condition as he received them, ordinary wear and tear excepted.

The tenant should always remove all of his personal effects during the term of his lease, as he will be

considered a trespasser if he attempts to go on the property for the purpose of removing personal property after the expiration of his lease.

When the lease has been made for a given time and the tenant continues to occupy the premises after the expiration of the lease without any further agreement, and with the knowledge and consent of the landlord, it is understood that he becomes a *tenant at will* and that the relation may be terminated by either party at any time by giving reasonable notice. If the property is a dwelling house and the rent is paid monthly, a month's notice would be sufficient. If the property is used for agricultural purposes and the tenant had planted crops and performed the usual labor necessary to the production of the crops of the coming year, the lease could not be terminated before the expiration of the year upon which he had entered.

Unless it is otherwise provided in the lease, a tenant may either assign or sublet. An assignment of a tenant's lease is made when all of his rights under the lease are transferred to another party. In this case the one to whom the tenant assigns is responsible either to the tenant or to the original landlord under the terms of the original contract. The landlord may look either to the first tenant or to the assignee for his rent and for the performance of other obligations according to the lease. When only a part of the property or term covered by the lease is turned over to another party by the tenant, he is said to have

sublet. In this case the subtenant is liable only to the tenant. It is customary to include in the lease a clause providing that the tenant shall neither sublet nor assign without the consent of the landlord.

Estates may also be divided into *equitable* and *legal* estates. When real property is deeded to A to hold in trust for B, A is said to have the legal estate while B has the equitable estate. A has exclusive control of the property and must exercise his right over it for the benefit of B, whose only right in connection with the property is to have the proceeds that are derived from its use after the necessary expenses have been met.

Estates are also divided according to the number of owners. When real property is owned by one person, it is called an estate in *severalty*.

When two or more persons own real property as joint tenants, the estate is called a *joint tenancy*. Each joint tenant owns a certain interest in each and every part of the estate. Upon the death of any joint tenant his interest immediately passes to the surviving joint tenants. Thus it will be seen that the last joint tenant will become owner of the property in fee simple. In order to create such an estate it is necessary that the deed contain words that clearly indicate that such an estate is intended.

When two or more persons own real property as tenants in common, the estate is called *tenancy in common*. In such an estate each tenant owns a certain interest in every part of the property, but

upon his death, his interest goes to his heirs who become tenants in common with the surviving tenants. In the United States a tenancy in common is understood to be intended when property is deeded to two or more persons without words which clearly indicate a different intention, except in the case of property deeded to a husband and wife, which creates an estate known in some states as an *estate by the entirety*. When property is so deeded, it will belong to the survivor in fee simple upon the death of either the husband or wife.

LESSON XXXI

REAL PROPERTY — Continued

51. Conveyances

51. Conveyances. — Land is conveyed from the owner to the buyer by means of a deed. There are three principal forms, the quitclaim deed, bargain and sale deed, and full covenant warranty deed.

A *quitclaim deed* is one in which the owner surrenders all right, title, or interest which he may have in the property to the grantee, but does not even guarantee that he has any right, title, or interest whatever. Such a deed would be acceptable only to one who is in a position to know exactly what the title of the grantor is. When two or more heirs to real property are settling an estate, it is sometimes desirable for one to purchase the interest of the others.

If A, B, and C are heirs, A has as much knowledge of the title of B and C as they have, and would be willing to accept from them a quitclaim deed, as their interest is equal to his; and having satisfied himself as to his own title, there could be no question in his mind regarding theirs. If two partners purchased real property through the investigation of only one of the partners, the one who made the investigation should be willing to accept a quitclaim deed, if he should buy out his partner's interest, as he has a better knowledge of the title than has the grantor.

A *bargain and sale deed* is one by which the grantor conveys property in fee to the grantee and all the grantor's right, title, and interest thereto, but makes no covenants or warranties as to the title or anything in connection with the property. This kind of deed is common where the title to the property is guaranteed by a title guaranty company.

A *full covenant warranty deed* is one in which the property is granted to the grantee and his heirs, and the grantor warrants that he has full title to the property and that there are no claims against it, and he further convenants that he will protect the grantee in his possession of the property forever. This is the form of deed usually given by a seller to a buyer of real property.

A land contract is an agreement between two parties in which one promises to sell, and the other to buy, a described piece of real property at a stated future time and upon agreed terms. It does not

amount to conveyance of title, but upon the failure of either to fulfill his part, the one so failing to perform would be liable in an action for breach of contract. Where justice can be done in no other way, a court of equity would decree specific performance.

A mortgage was a conditional sale under the common law, and, immediately upon executing the mortgage, the title passed to the mortgagee under a provision that it should revert to the mortgagor upon the payment of a debt which was usually represented by a note or bond. Thus it will be seen that the mortgage was given as collateral security for the payment of the bond. So much hardship was caused by the practice of enabling the mortgagee to become the absolute owner of the mortgage upon default in payment of the debt which the mortgage was given to secure, that the common law rule has been changed by statute in nearly all the states. The mortgagee, upon default in payment, may foreclose his mortgage and give notice that unless the debt with interest is paid by a certain time, the property will be sold, and the proceeds applied toward the payment of such debt. The law provides that the mortgagor may, within a stated time, secure the property by the payment of the debt with interest and all costs. This is known as the mortgagor's right of redemption. If mortgaged property is sold to satisfy the debt, and there is a surplus after the debt is paid, the mortgagor is entitled to it.

There may be any number of mortgages on a given

piece of real property. Where more than one mortgage exists, these will be paid in the order in which they are recorded.

A deed of real estate is not operative until it has been delivered. A deed may be signed, sealed, and witnessed, but it is of no effect until it has been actually handed by the grantor to the grantee or his representative. For example, it has been held that a deed which has been properly executed by a grandfather to his grandson, but which was not delivered by the grandfather before his death, does not convey to the grandson the property described in the deed. When a deed that is intended to become operative after the expiration of a certain time, or at the death of the grantor, has been delivered to a third party with instructions to deliver to the grantee upon the happening of a certain event, such delivery is called a *delivery in escrow* and will have the same effect as if the delivery had been direct by the grantor to the grantee.

The one to whom property is mortgaged or deeded should immediately have the mortgage or deed recorded in the County Clerk's office or in such other place as may be designated by law. The purpose of recording deeds and mortgages is to notify the public regarding the transfer. It should be remembered that while the recording of a deed is not necessary to establish its validity as far as the buyer and seller are concerned, yet, should the buyer neglect to have his deed recorded, the one from whom he bought

might sell to an innocent third party who, upon having his deed recorded, would become the owner of the property as against the first buyer.

LESSON XXXII

52. Cases on Real Property.

(1) *McConnell* v. *Blood*, 123 Mass. 47. — One Cunningham owned a shoe shop containing various pieces of machinery, viz., an engine and boiler, steam gauge, water tank, steam pump, lines of shafting connected with the engine, and about twelve small machines used in the shoe business. All the machinery was fastened to the building more or less securely. McConnell claimed the machinery as vendee thereof from Cunningham, and Blood claimed it under a mortgage covering all the realty.

(2) *Astry* v. *Ballard*, 2 Mod. Rep. (Eng.) 193. — Astry leased to Ballard certain premises without mentioning the use to which they were to be put, and without mentioning mines. Ballard found certain coal mines on the premises, some opened and workable and others which had never been opened. He took coal from the opened mines and also opened and worked the new mines. Astry brought suit for the value of all the coal taken out and sold.

(3) *Tulk* v. *Moxhay*, 2 Phillips (Eng.), 774. — Tulk sold a piece of open ground surrounded by houses to one Elms, who covenanted in the deed to keep the

ground in good repair, to maintain the iron fence and statue, and to preserve the park or square in an open state, without any buildings. The land passed by various conveyances to Moxhay, whose deed contained none of the convenants. Moxhay intended to alter the character of the square, and to build on it, when Tulk sought an injunction to prevent his doing so.

(4) *Witty* v. *Matthews*, 52 N. Y. 512. — Matthews leased to Witty certain premises. The only statements in the lease as to repairs were as follows: (*a*) If the premises were partially damaged by fire, but not rendered untenantable, the landlord should repair them at his expense. (*b*) If the premises were rendered untenantable, the rent should cease until repairs were made. (*c*) If the premises were totally destroyed, the lease should terminate. During the life of the lease the building was so damaged by fire as to be untenantable, but was not destroyed. The landlord refused to repair the premises and Witty sued for damages for breach of the convenants of the lease.

(5) *Barson* v. *Mulligan*, 191 N. Y. 306. — Mulligan owned a parcel of land in Albany and gave a mortgage thereon for five years to Barson to secure an indebtedness. At the end of five years the debt was not paid and Barson commenced an action of ejectment to put Mulligan off the land, claiming he had legal title to it by virtue of his mortgage.

(6) *Kimball* v. *Sattley*, 55 Vt. 285. — One Roberts

owned a farm on which were growing crops of rye, wheat, and potatoes, a field of natural hay, and a wood lot. The entire farm with all the buildings and appurtenances, was subject to a mortgage in which Kimball was the mortgagee. Roberts gave a chattel mortgage to Sattley, covering all the stock, grain, hay, and personal property on the premises. By virtue of his mortgage, Sattley took possession of the rye, wheat, and potatoes, cut and carried away the hay from the field, took two cords of wood piled in the wood lot, and cut a number of standing trees. Kimball brought suit for the value of all the things taken, claiming them by virtue of his general mortgage.

(7) *Stone* v. *Cocks*, 67 Miss. 511. — Stone prepared a deed of a piece of land which he owned to his sister, Mrs. Cocks, and put it in his safe. Being in poor health and about to start on a journey, he told his clerk, Jacques, about the deed and told him not to deliver the deed to Mrs. Cocks unless he died on the journey. He did die on the journey and Jacques delivered the deed to Mrs. Cocks. Mrs. Stone then brought suit to have the deed canceled, and for possession of the property as her husband's heir.

(8) *Stevens* v. *Kelley*, 78 Me. 445. — Kelley owned a mill and a mill dam on a non-navigable stream. The dam set backwater on Stevens's land, forming a pond from which ice could be cut in the winter. The mill had been abandoned for some years, and the dam was not used except that, when the ice formed on the

pond, the defendant would draw off the water and prevent the plaintiff from harvesting the ice. Stevens sued for damages.

(9) *Shock* v. *City of Canton*, 66 Ohio St. 19.—Shock owned a mill on a small river below the city of Canton and derived power to run his mill from the river. The city had established water works on the river and took water for domestic, commercial, and manufacturing purposes. As the city grew, it used so much water that Shock could not get enough power to run his mill and brought suit against the city for damages.

(10) *Bancroft* v. *White*, 1 Caines (N. Y.), 185.—Hawes, a former husband of the plaintiff, conveyed a piece of land in the town of Canaan, owned by him during his marriage, to one Brooker, and by various conveyances it came into the possession of White, Mrs. Hawes did not join in the deed, and it was not customary in the town of Canaan for wives of grantors to join in a deed. Mrs. Bancroft, after the death of Hawes, sued for the value of her dower in the land.

(11) *Roberts* v. *Baumgarten*, 110 N. Y. 380. Roberts brought suit to recover possession of certain lots in New York City. The lots were formerly in the bed of Harlem Mill creek, a navigable stream where the tide ebbed and flowed. The old deed, under which Roberts claimed, granted the land "including the mill-stream and mill and mill-pond."

(12) *Ocean Grove* v. *Asbury Park*, 40 N. J. Eq. 447, was a case in which the plaintiffs bored in their own

land for water over 400 feet, and procured a flow of 50 gallons per minute. The defendants then sank a shaft, 8 feet less in depth than plaintiffs', on land of a third party where they had permission to bore. This shaft was 500 feet from plaintiffs' well, and a flow of 30 gallons per minute was obtained. As soon as this well started, plaintiffs' flow decreased to 30 gallons per minute. The defendants proposed to sink other shafts still nearer to plaintiffs'. The plaintiffs bring this action to recover damages for the loss of the water from their well and to restrain the defendants from drilling other wells.

LESSON XXXIII

(1) *Peck* v. *Conway*, 119 Mass. 546.—This was a case in which the owner of a large tract of land conveyed a part of it to a buyer, whom we will call B, with the reservation in the deed, "That no building is to be erected by the said B, his heirs or assigns, upon the land herein conveyed." The seller retained the balance of the land as his homestead and later sold it to Peck. B afterwards sold his property to Conway without making any mention of the reservation. Peck claims that Conway has no right to ignore the clause regarding building, in the original deed of the property now owned by Conway.

(2) *Braman* v. *Bingham*, 26 N. Y. 483.—Bingham executed a deed to Braman and delivered it to a third

party, who was to hold it while Bingham was absent on a journey and on his return deliver it back to him. Braman claimed that the third party held the deed in escrow.

(3) *Jackson* v. *Phipps*, 12 Johns. (N. Y.) 418.—In this case the grantor of real property agreed to give the grantee a deed of his farm as security for a debt. In conformity with this agreement, the grantor, immediately upon returning to his home, executed and acknowledged a deed and left it in the County Clerk's office to be recorded. The grantee did not know that the deed was made and left at the clerk's office, as neither he nor any person representing him was present to receive it. This action was brought to determine whether there had been a delivery within the law or not.

(4) *Fisher* v. *Hall*, 41 N. Y. 416.—A conveyance of real property was subscribed and sealed by the grantor, and attested by witnesses under a clause stating that it had been sealed and delivered in their presence, but the grantee was not then present and remained ignorant of the deed until long after the death of the grantor who continually retained the deed in his possession until his death. The question of delivery is the important one in this case.

(5) In *Haynes* v. *Aldrich*, 133 N. Y. 287, defendant leased certain premises for a year, the term expiring May 1. Before the expiration of the time, defendant informed plaintiff that she did not wish to renew her lease for another year. May 1 was a

holiday, and possession was retained until May 4, the excuse given being the difficulty to get trucks to move defendant, also that on the third of May one of the boarders was ill. On the afternoon of the fourth of May the keys were tendered plaintiff and refused. Under these circumstances, what are the landlord's rights?

(6) *Lucas* v. *Coulter*, 104 Ind. 81.—This was an action for rent of a store leased to defendant. The defense was that the store was rented for the manufacturing and selling of musical instruments, and that it was so imperfectly and defectively constructed that rain and sand came through the roof and ceiling, causing damage to the instruments. This action was brought on the implied warranty that the premises were fit for the purpose for which they were rented.

(7) *Warner* v. *Tanner*, 38 Ohio St. 118.—Tanner and one Bartlett executed an instrument under seal by which Tanner leased to Bartlett two acres of land with use of water and the privilege of conducting it to a cheese house to be erected by Bartlett. Bartlett agreed to pay $30 per year for the premises while he should use them for the manufacture of cheese, and, when the premises were no longer to be used for that purpose, they were to revert to Tanner, Bartlett having the privilege of removing all buildings and fixtures erected by him. Bartlett claimed that, under this agreement, he had a life estate, provided he complied with the conditions of the contract.

(8) *Proffitt* v. *Henderson*, 29 Mo. 325.—David

Proffitt, at his death, was seized of a certain tract of land, in which he devised to his wife a life use, and at her death the remainder went to his children. The widow conveyed her interest to defendant. This action was brought by the children against defendant for waste in cutting and carrying away timber worth $600. It was shown that the property was timber land and not valuable for anything else. What are defendant's rights?

(9) In re *Rausch*, 35 Minn. 291.—Maria Rausch, by an instrument in writing which recited that, in consideration of the sum of $100 to her paid by her husband, Henry Rausch, and the further sum of $300 agreed to be paid to her by him in two years, she did "remise, release, convey, and set over unto the said Henry Rausch" all her estate or claim to all real and personal property now owned or hereafter acquired by said Henry Rausch. She further agreed to make no claim on him or his heirs for any further interest in his property. At his death she applied for her dower interest.

(10) *State* v. *Pottmeyer*, 33 Ind. 402.—In this case a non-navigable stream flowed through the land of a certain party who claimed the exclusive right to the ice forming on this stream in its natural channel over his land. The question was also raised, as to whether the person owning the land on one side of this stream would be liable for any damages, to the party owning the land on the opposite side of the stream, for ice taken beyond the middle of the stream.

(11) *Turner* v. *Townsend*, 42 Neb. 376.—Turner was the tenant of property belonging to Townsend and, during his tenancy, a storm broke a front window which was replaced by the tenant, the landlord having refused to put in a new one. This action was brought by Turner to recover the price of the new window.

(12) *Collins* v. *Hasbrouck*, 56 N. Y. 157.—In this case the tenant made a contract in which he conveyed the whole of his unexpired term under his lease with the landlord, but reserved rent at a rate and time of payment different from those in the original lease, and also the right of reëntry in case the new tenant failed to pay his rent or violated any of the conditions of the contract; and also providing that the premises were to be surrendered to the first tenant at the expiration of the time. This action was brought to determine whether there had been an assignment or subletting.

LESSON XXXIV

CONTRACTS FOR THE BAILMENT OF PERSONAL PROPERTY

53. Definition.
54. How Created.
55. Tortious Bailment.
56. Degrees of Care.
57. Classification.

53. Definition. — A *bailment* is the transfer of personal property by one party to another for some specific purpose with the understanding that it shall be returned or redelivered at the expiration of a stated time, or upon the completion of the purpose for which the bailment was made. The person transferring the property is called the *bailor* and the one to whom it is transferred, the *bailee*.

It is held that a bailment is created even when the property is to be returned in a different form from that in which it was received. For example, wheat to be returned in the form of flour, bran, and middlings. It is also quite generally held that where grain is delivered to a warehouseman to be stored in a bin with other grain of equal grade, and a like number of bushels are to be returned at some

future time, the transfer is a bailment notwithstanding the fact that the original grain is not to be returned to the bailor. This is an exception to the rule that the same thing must be returned or redelivered in order to constitute a bailment.

54. **How Created.** — A bailment is created by a contract between the bailor and bailee, which should specify the purpose for which the bailment is created, the duration of the bailment, the use that is to be made of the thing bailed, and any other facts which may be necessary to determine the respective rights of bailor and bailee.

55. **Tortious Bailment.** — When property comes into the possession of one not its owner as a result of theft or fraud, a *tortious bailment* results. This obligation is not the result of contract but is imposed by law for the protection of the owner. A tortious bailee will be held more strictly accountable for the care of the property than an ordinary bailee. He will be absolutely liable for any loss that may occur while the property is in his possession even if he is not negligent. When one finds personal property, he should make a reasonable effort to find the lawful owner, and in case he fails to do so, he may treat the property as his own. If he makes no such effort, he is a tortious bailee. When expense has been incurred by the finder, such expense may be recovered from the owner before the property is surrendered to him.

56. Degrees of Care. — There are three degrees of care: namely, slight, ordinary, and extraordinary. Ordinary care may be defined as the care which an ordinarily prudent person would take of his own property. Less than this degree of care would be slight care, and more would be extraordinary care.

Some authors mention three degrees of negligence, but the weight of authority seems to favor but one degree of negligence, and whether or not negligence exists in a given case will depend upon whether the required degree of care has been given the property by the bailee. Absence of the required degree of care would be negligence.

57. Classification. — The American classification of bailments is as follows:

(*a*) Bailment for the benefit of the bailee.
(*b*) Bailment for the benefit of the bailor.
(*c*) Bailment for benefit of bailor and bailee.

When the bailment is for the benefit of the bailee only, he is expected to use the property with extraordinary care. For example, A borrows B's bicycle to ride to a certain place and return. He must take the greatest care possible of the bicycle and will be liable for its loss, even though the loss resulted from the slightest negligence on his part.

Where the bailment is for the benefit of the bailor only, the bailee is expected to take only slight or reasonable care of the property, and will be liable only when he fails in the exercise of such care. For

example, A, who is to be out of the city for a few days, asks B to keep his horse for him until his return. B undertakes to keep the horse. He must take reasonable care of him, but would not be expected to go to unusual expense or trouble.

Where the bailment is for the benefit of both bailor and bailee, such care as is taken by an ordinarily prudent person of his own property will be expected of the bailee, and he will be liable only for loss which results from the absence of such care. For example, A takes his watch to a jeweler to be repaired. Both parties are benefited by the bailment, and ordinary care of the watch must be taken by the jeweler.

LESSON XXXV

BAILMENTS — Continued

58. Use of Property.
59. Lien.
60. Pledge.
61. Warranties.
62. Liability.
63. Termination.

58. Use of Property. — In the case of a bailment for the benefit of the bailor only, no use could be made of the property by the bailee, except such as might be necessary for the welfare of the thing bailed.

Any benefit that might be derived from the use of the property would belong to the bailor.

When the bailment is one for the benefit of the bailee only, he may make such use of the property as would be consistent with the bailment purpose.

In bailments for the benefit of both parties the bailee will have the right to use the chattel in accordance with the contract.

59. Lien. — When property has been transferred to a bailee to be carried from one place to another, to have some service performed upon it, or to be stored, the bailee has the right to retain possession of the property until the payment for the service has been made. This right is called a *lien*. If the bailee gives up his possession before payment is made, he loses his right of lien and becomes an ordinary creditor of the bailor.

60. Pledge. — *Pledge* is a bailment in which the bailor transfers personal property to the bailee as security for the payment of a debt, with the understanding that when the debt shall have been paid the property is to be returned to the bailor. The possession of the property is in the bailee and the title remains in the bailor.

If the pledgor fails to pay the debt secured by the pledge, the pledgee may sell the property, at private sale if so provided in the contract of pledge, and at public sale if not so provided, and the proceeds of the sale must be applied to the payment of the debt.

If there is a surplus after paying the debt and costs, such surplus must be returned to the pledgor. In most states the law prescribes how pledged goods shall be sold. The pledgee must give notice to the pledgor before selling the property which has been pledged. This is intended to give the pledgor an opportunity to redeem the property. Where no notice of sale can be given a pledgee owing to inability to ascertain his whereabouts, a sale should be made under court direction after the necessary proceedings.

61. **Warranties.** — When a bailment is created for the purpose of having repairs made to the thing bailed, the bailee impliedly warrants that he has the necessary skill to perform the service. If loss results through his failure to exercise the degree of skill which is required in such cases, he will be liable for breach of warranty. This holds good even in cases of gratuitous bailment. The bailee who undertakes, without promise of compensation, to perform service upon a thing belonging to the bailor cannot be required to undertake the task, but having begun the work he must exercise skill and care in its performance.

There is also a warranty of title on the part of every bailor.

62. **Liability.** — In a mutual benefit bailment the bailee is required to take ordinary care of the property in his possession and is liable for any loss re-

sulting from his negligence. As has been stated in a previous section, the degree of care required of the bailee, for whose sole benefit the bailment is created, is much greater than that required in the mutual benefit bailment. It has also been stated that the care required of a bailee in the case of a bailment for the sole benefit of the bailor is much less than that in either of the other two classes of bailments. In all of these bailments the bailee will be liable for any loss that can be shown to have resulted from negligence on the part of himself or his agents. Failure to exercise the degree of care required in any given bailment will be considered negligence. It will be seen that, when the loss occurs as a result of inevitable accident or through natural causes, the bailee will not be liable.

63. **Termination.** — Since the bailment relation is created by an implied or express contract, it will terminate in accordance with the terms of the contract. In the absence of any definite statement regarding the termination of the bailment, it will be understood that the relation will terminate upon the fulfillment of the purpose for which it was created. Return of the property to the bailor or redelivery upon his order will terminate the bailment relation. A bailment may come to an end also through agreement of the parties to it. Any act by either party inconsistent with the relation of bailor and bailee will terminate the bailment.

LESSON XXXVI

64. Cases on Bailments

(1) *Commonwealth* v. *Krause*, 93 Pa. St. 418. — Krause agreed to purchase two horses for $150 of Deemer and to pay for them on delivery. At the time they were delivered Krause had but $25 and he gave this amount to Deemer, with the understanding that he, Krause, should keep the horses until the following Tuesday, at which time he would either pay the balance or return the horses, the title in the meantime to remain in Deemer. No payment was made on Tuesday. The following Thursday the horses disappeared, having been sold by Krause. Deemer offered to return the $25 and demanded his horses. Krause refused to deliver them back.

(2) *Bretz* v. *Diehl*, 117 Pa. St. 589. — William D. Newman was a miller in the town of Bedford. The sheriff levied on eighty or ninety barrels of flour in his mill. It appears that some of this flour was made of wheat belonging to Bretz, the plaintiff in this case. It was purchased by Diehl, one of the judgment creditors, at the time of the sheriff's sale. This action was brought by Bretz to recover the value of the flour from Diehl, on the ground that it did not belong to Newman and should not, therefore, have been levied upon. It appears from the evidence in the case that when Bretz took the wheat to the mill, he received from Newman a receipt stating

that he, Newman, had received a certain number of bushels of wheat which was to be put into a common bin in the mill and out of which Newman was to grind flour to fill his orders. It was further understood that Bretz was entitled to the flour, bran, and middlings from wheat of similar grade, whenever he chose to call for it, but it was not understood that his flour, bran, and middlings were to be made from the identical wheat that he delivered at the mill.

(3) *Foster* v. *Essex Bank*, 17 Mass. 479. — Foster left $50,000 in gold at the Essex Bank for safe-keeping. No special payment was made for this service. The cask containing the gold was weighed in the presence of the president and cashier, but the directors had no knowledge of the transaction. It was the custom of the bank, however, to receive such goods for safe-keeping. No special account was kept by the bank for such transactions. The cashier and chief clerk of the bank stole all of this gold and much of the money that belonged to the bank. It was shown at the trial that the books at the bank had been falsified for over two years and that during all that time they had not been posted. This action was brought by the executors of Foster to recover the amount from the Essex Bank.

(4) *Stearns* v. *Marsh*, 4 Denio (N. Y.) 227. — Marsh owed Stearns a sum of money which was payable on the 8th day of November, 1837. To secure payment of the obligation, Marsh delivered to Stearns ten cases of boots, to be held as a pledge. On the 15th

day of November, Stearns sold the boots at public sale in Boston. He published a notice of the sale in the newspapers in that city, but gave no notice of the sale to Marsh. No opportunity was given to Marsh to redeem the pledge. The net proceeds of the sale were insufficient to pay the entire debt, but they were applied to the payment of the debt by the plaintiffs without the assent of Marsh, the defendant. This action was brought to recover the balance.

(5) *Small* v. *Robinson*, 69 Me. 425. — Small owned a hack which he turned over to one Staples in accordance with the terms of a contract which provided that Staples was to buy it. The sale had not yet been completed. Robinson was a carriage maker, and it was shown that he was aware of the fact that the hack was owned by Small but that Staples had agreed to buy it. Staples took the hack to Robinson to be repaired, and after making the repairs, Robinson refused to permit Small to take it away until the repairs had been paid for. This action was brought by Small to compel Robinson to deliver the carriage to him.

(6) *Sensenbrenner* v. *Mathews*, 48 Wis. 250. — Maxwell was a buggy painter and occupied a part of a building in which Sensenbrenner conducted a blacksmith shop. Maxwell took a buggy upon which the woodwork had been completed to Sensenbrenner to have the ironwork done. After the ironwork was completed, the buggy was turned over to Maxwell, who intended to paint it and sell it. Sensenbrenner

notified Maxwell not to dispose of it until the ironwork had been paid for. Maxwell disregarded this order and sold it to Henry. Sensenbrenner refused to allow Henry to take it away. Henry secured a writ of replevin and Mathews, the sheriff, took the buggy while Sensenbrenner was absent.

(7) *Pulliam* v. *Burlingame*, 81 Mo. 111. — Burlingame went to Pulliam and borrowed two mules which were in the rightful possession of Pulliam. Later, Pulliam demanded that the mules be returned, but Burlingame refused to return them, on the ground that his wife, who was Pulliam's sister, owned half interest in the mules, and that he had taken them from Pulliam and was holding them as her agent. This action was brought to recover possession of the mules.

LESSON XXXVII

(1) *Esmay* v. *Fanning*, 9 Barb. (N. Y.) 176. — In June, Esmay had a carriage in storage at the livery stable of George L. Crocker. From time to time, he loaned it to Fanning. About the first of November of the same year, Fanning had the carriage and was asked by Esmay to return it to him. Instead of returning it to him, as requested, Fanning took the carriage to the livery stable of Crocker and left it. This action was brought by Esmay for the value of the carriage, on the ground that it had not been redelivered in accordance with the request of the plaintiff.

(2) *Wentworth* v. *McDuffie*, 48 N. H. 402. — McDuffie hired a horse of Wentworth to drive from Rochester to Dover. The horse was driven by McDuffie to Hoyt's, two miles from the point agreed upon. Upon his return to Rochester, it was found that the horse was exhausted and sick, and he died about a half hour later. This action was brought against McDuffie for the value of the horse.

(3) *Claflin* v. *Meyer*, 75 N. Y. 260. — In this case the plaintiff delivered to the defendant, who was a warehouseman, certain goods to be stored for a certain consideration in money. When the plaintiff asked the defendant for the goods so stored, he was told by the defendant that the goods could not be returned as they had been stolen. This action was brought for the value of the goods. The plaintiff made no attempt to prove that the warehouseman was negligent.

(4) *Hunt* v. *Wyman*, 100 Mass. 198. — This was an action for the price of a horse. Plaintiff had the horse for sale and agreed to let defendant take it and try it; if he did not like it, he was to return it, on the night of the day he took it, in as good condition as he got it. Almost as soon as the horse was delivered to defendant's servant, it escaped from him, without the servant's fault, and was injured so that the defendant could not try it. The horse was not returned in the time stated.

(5) *Fisher* v. *Kyle*, 27 Mich. 454. — The defendant hired a horse of the plaintiff to drive to a certain

place. He drove beyond the place stated and the horse fell dead while being driven. It was shown that there was no negligence on the part of the defendant. This action was brought to recover the value of the horse.

(6) *Smith* v. *Meegan*, 22 Mo. 150. — The defendant took plaintiff's boat to make certain repairs upon it. After making the repairs, defendant launched it in the river at a time and under circumstances of great danger, which should have been foreseen and which resulted in the destruction of the boat. This action was brought to recover its value.

(7) *Tucker* v. *Taylor*, 53 Ind. 93. — The defendant was a mechanic who received a wagon from the plaintiff to repair. It was agreed between them that the defendant should receive for his labor the use of the wagon and a horse with which to take a certain journey. After the work was completed, the defendant permitted the owner to take the wagon, with the understanding that it was to be returned at a later date, with a horse, so that the defendant could make the journey. The owner having failed to furnish the horse and wagon, the defendant asserted his lien and sold the wagon. This action was brought by the original owner to recover the wagon.

LESSON XXXVIII

EXCEPTIONAL CONTRACTS OF BAILMENT

INNKEEPERS

65. Definition.
66. Guest.
67. Liability.
68. Lien.

65. Definition. — An innkeeper is one who makes a continuing offer to the public to furnish entertainment in the form of food and lodging for a compensation. He differs from the boarding-house keeper in that he must receive any one who may ask for entertainment, except one who would injure his business, or one who applies after all available accommodations have been spoken for, while the boarding-house keeper takes only those with whom he may care to contract. It has been held that the operators of Pullman cars cannot be held liable as innkeepers, for though the service is similar to that rendered by innkeepers, the conditions under which this service is rendered are very different from those under which the innkeeper conducts his business, and the chance of property loss may be very much greater.

66. Guest. — One who partakes of the hospitality offered by an innkeeper is called a *guest.* This does not apply to one who has been invited to accept entertainment without compensation. A person becomes a guest immediately upon turning his baggage over to a hotel porter at a railway station, or at any other place, and continues as a guest until he has permanently withdrawn his baggage from the custody of the innkeeper or his servants, or until he has turned his baggage over to the innkeeper to be stored and has left the hotel. He may leave the hotel temporarily and still continue a guest providing he is paying for his room.

67. Liability. — The innkeeper is liable for all losses of baggage sustained by guests, except those which occur through carelessness of the guest or by Act of God. His liability covers loss through dishonesty of his servants or other guests. Some states have passed a statute modifying the common law regarding the liability of the innkeeper for the baggage of his guests, on the ground that the common law rule, which is here stated, is too severe when modern methods of conducting a hotel are taken into consideration.

The innkeeper may make reasonable requirements regarding the care of his guests' baggage, and he usually gives notice to the guest that he will be responsible for valuables only when they have been given him personally to be cared for in the office where facilities are provided for their safe-keeping.

Such a notice must be posted in a conspicuous place, and it must be reasonably certain that it has been brought home to the guest. All property of the guest that is necessary or proper may be kept in his room, but he must comply with all reasonable regulations limiting the innkeeper's liability for valuables.

68. Lien. — Since the innkeeper is generally required to receive any one who asks for entertainment, he may exact payment in advance, or he may claim a lien for his charges on the property which his guest brings to the inn. His lien is like that of any bailee, in that it continues only so long as he keeps the property in his possession. If he surrenders it to the guest, he loses his right of lien. The innkeeper is liable only as any other bailee for the baggage left with him after the owner has ceased to be a guest at the hotel.

LESSON XXXIX

69. Cases on the Law of Innkeepers

(1) *Fay* v. *Pacific Improvement Co.*, 93 Cal. 253. — The improvement company was the owner of the Hotel Del Monte and the plaintiff who, while a guest of the inn, lost jewelry, clothing, and other personal property needed for her personal use, in a fire which destroyed the hotel. The defendant claimed that, at the time the plaintiff registered at his hotel, she had asked for rates and had been quoted a special price

per week for her entertainment, and was, therefore, a boarder and not a guest. It was further claimed by the hotel owner that the value of the jewelry lost could not be recovered. The cause of the fire was probably the imperfection of the batteries which supplied the bells with electricity.

(2) *Kisten* v. *Hildebrand*, 9 B. Monroe (Ky.) 72. — In this case the defendant, Hildebrand, kept a boarding house and occasionally entertained transients. The plaintiff was a regular boarder. The plaintiff's trunk was broken into and a large sum of money stolen. This action was brought to hold Hildebrand liable as an innkeeper.

(3) *De Wald* v. *Bowell*, 2 Ind. App. 303. — Bowell was the owner of the Ross House, and Caswell, a traveling salesman for De Wald & Co., became a guest at the Ross House, giving his satchel containing $252 to a servant of the inn. The satchel was placed in a coat room adjoining the office. When Caswell called for the satchel, he found that it had been opened and the money stolen. This action was brought to recover the amount so lost.

(4) *Sibley* v. *Aldrich*, 33 N. H. 553. — Sibley, while a guest at an inn belonging to Aldrich, delivered his horse to Aldrich to care for in his stable. The horse was kicked and injured by a horse belonging to another traveler, but without negligence on the part of Aldrich or his servants. This action was brought to recover damages for the loss of the horse, which died because of his injuries.

(5) *Hulett* v. *Swift*, 33 N. Y. 571. — Plaintiff was a guest at defendant's hotel, and while he was there his goods were destroyed by fire, the cause of which was unknown. It was proven that the plaintiff was in no way negligent.

(6) *Read* v. *Amidon*, 41 Vt. 15. — Read and his father drove to Amidon's hotel, had their horse cared for, and dined at the hotel, remaining until evening, when they left for home. Plaintiff, having sustained a certain loss at the hotel, brought this action to recover damages. The only point involved is as to whether plaintiff was a guest within the legal meaning of that term.

(7) *Pullman Palace Car Co.* v. *Smith*, 73 Ill. 360. — Smith purchased a ticket on the Palace Car Company's car and, while asleep on his trip, his money was taken from his vest pocket. This action was brought against the company as innkeepers.

(8) *Rockwell* v. *Proctor*, 39 Ga. 105. — Defendant was an innkeeper, and plaintiff went to his hotel and, while there, gave his coat to a negro who was in charge of the check room. The coat was lost and this action was brought to recover its value.

(9) *Sasseen* v. *Clark*, 37 Ga. 242. — The defendant sent his porter to meet the trains and to receive baggage of persons traveling and desiring to stop at his hotel. Plaintiff's baggage was lost after he gave it to Clark's porter. It was not shown that it ever reached the hotel. This action was brought to recover its value.

LESSON XL

EXCEPTIONAL CONTRACTS OF BAILMENT — CONTINUED

COMMON CARRIERS

70. DEFINITION.
71. CHARGES.
72. LIEN.
73. LIABILITY.
74. DELIVERY.
75. CARRIERS OF PASSENGERS.

70. Definition. — A *common carrier* is one who holds out to the public a continuing offer to carry goods between regularly designated points for a compensation. He must carry for any one who offers goods for carriage, so far as his facilities will permit. Explosives and other things that would involve unusual risk may be refused by the common carrier. Truckmen and cartmen are not common carriers, as they hold out an offer to carry for only those with whom they choose to contract. Railway and express companies are common carriers.

71. Charges. — Under the common law, a common carrier could make any reasonable charge for his

service. He could make different rates for different shippers, even for the same service, providing the rate in no case was unreasonable. Under modern conditions, it has become necessary to regulate, in some degree, the matter of freight rates. In 1887 the Interstate Commerce Law was passed by Congress. It was the purpose of this law to regulate the commerce between the states, in the interest of all shippers, and it applies to all common carriers who do business in more than one state. Among its provisions are the following:

No discrimination shall be made between large and small or between regular and occasional shippers.

No charges shall be unjust or unreasonable.

Proportionate charges shall be made for long and short distances.

A schedule of rates shall be published and filed with commissioners who are appointed to see to the enforcement of the law.

No common carrier shall enter into any combination or agreement that shall in any way interfere with the carriage of freight from one point to another.

Since nearly all railroads and express companies do interstate business, this act applies to practically all such common carriers.

72. **Lien.** — The carrier does not ordinarily exact payment before the goods are ready for delivery to the consignee, although he may require payment in advance if he wishes. He has a bailee's lien on the goods to secure the payment of charges. The shipper

is responsible to the carrier for the freight. The consignee is liable only when he expressly agrees to assume the liability. If the common carrier delivers the goods to the consignee or any person authorized by him to receive them, without first securing the freight charges, his right of lien is lost.

73. Liability of the Carrier. — The common carrier was liable, under the common law, for all loss or damage to the goods while in his possession as carrier, except loss or damage resulting from an Act of God, or of the public enemy, or an inherent quality in the goods shipped, or through the carelessness of the shipper. Under the head of Act of God are included storms and other weather conditions, such as lightning, flood, etc. By public enemy is meant an enemy of the public as a whole. This does not apply to a mob of strikers, or to any other of the ordinary disturbers of the peace.

The severe liability of the common carrier has been diminished by statutes. He is not liable for loss occurring through the negligence of the shipper in preparing the goods for shipment, nor is he liable for loss which is due to fraud on the part of the shipper in concealing the identity of the goods shipped. It is necessary for the carrier to know the general nature of the goods in order that he may take such care of them as would be required to prevent loss. This is only fair to him since an exceptional liability is imposed upon him by law.

The carrier is not liable for loss occurring because

of some inherent quality in the goods. This applies where animals are shipped by freight and do themselves injury, or where fruits decay during the time they are in the custody of the carrier, without fault or negligence on his part.

The carrier is not liable for loss of the goods through an act of public authority. When the goods are seized by due process of law, the carrier is not liable for failure to deliver in accordance with his contract. He must know at his peril, however, that the officer who demands the goods has the legal right to have them.

The carrier may further limit his liability by contract entered into at the time the shipment is accepted for transportation. Any reasonable limit as to amount for which he will be liable will be held valid. He may not, however, even by contract, free himself from liability for loss occurring through carelessness or fraud on the part of himself or any of his employees, except in states where a statute has been passed changing this common law rule. In New York State the carrier may, by contract, free himself from liability for the negligence of his employees. He must take the best possible care of the goods and carry them safely to their destination.

The carrier's liability begins as soon as he or his employee accepts the goods for transportation. In the case of express companies, liability begins when goods are delivered to the driver on the collection express wagons sent out by the company, and con-

tinues until goods are delivered to the consignee in all places where a delivery service is maintained.

When the goods are accepted by a common carrier to be transported to a certain point and there to be delivered to a connecting carrier, the liability of the initial carrier ceases as soon as delivery of the goods in good condition is made to the connecting carrier, unless the initial carrier has contracted to carry the goods to their final destination, in which case each of the connecting lines will be considered an agent of the initial carrier.

When goods are lost, the shipper has a *prima facie* case against the initial carrier who must prove that the goods were delivered to the next carrier in good condition.

74. **Delivery.** — It is the duty of the carrier not only to carry the goods safely to their destination, but also to deliver them to the consignee, his agent, or assignee. He should be required to give the shipper a receipt, called a *bill of lading*, containing a list of the goods received and the terms of the contract for transportation. A duplicate of this receipt is sent to the consignee, who generally is required by the carrier to surrender it upon receipt of the goods. The carrier must know the identity of the party to whom he delivers, as he insures delivery to the designated consignee.

The extreme liability of the carrier has been held in some states to cease as soon as the goods have been stored in the warehouse at their destination. From

that time to the time they are taken by the consignee, the carrier is liable only as a warehouseman. He is liable only for loss that is caused by negligence of himself or his employees. In other states it is held that the extreme liability of the carrier continues until the consignee has been notified and has had a reasonable opportunity to take the goods away from the warehouse. Express companies are required to deliver to the residence or place of business of the consignee in cities or villages where they maintain a delivery service.

75. **Carriers of Passengers.** — Common carriers of passengers must exercise great care in the conduct of their business. They must accept for transportation any person who desires their service, except intoxicated persons or those who would in any way interfere with the business of the carrier. Persons who are in poor health, who are for any reason unable to care for themselves, need not be accepted by the carrier, except when accompanied by some one whose duty it is to look after them. A person becomes a passenger, in a legal sense, as soon as he enters upon the property of the carrier for the purpose of being carried from one place to another, and continues to be a passenger until he has departed from the property of the carrier at his destination. The common carrier may make suitable rules for the conduct of his business and may require passengers to purchase tickets in advance or to pay a cash fare, when called upon to do so by the official in charge of the train.

The tickets issued by the railway companies usually contain a contract limiting the company's liability for the loss of baggage to a certain amount. By baggage is meant the personal effects of the traveler that are necessary for his convenience and comfort while traveling. Articles for members of his immediate family are considered baggage, but any articles for persons outside of his family are not so considered. The carrier's liability for loss of baggage to the extent of the amount stated on the ticket is the same as that of the carrier of any other property received for transportation. Common carriers are insurers of the goods except in cases where their liability is limited by contract.

LESSON XLI

76. Cases on the Law Relating to Common Carriers

(1) *Chapman* v. *Fish*, 2 Ga. 349. —William Fish received from the agent of the Central R. R. Co. certain packages of goods belonging to Chapman which by a special contract he, Fish, promised to deliver in good order and condition at Macon, unavoidable accidents excepted. In attempting to cross a stream, his wagon was upset and the goods were damaged. Chapman brought an action against him to recover for the loss which resulted from the in-

jury to the goods. Two questions involved in the case are:

First, Was Fish a common carrier, and if so was he liable?

Second, If he was not a common carrier, was he liable for loss under his contract?

(2) *Scofield* v. *Railway Co.*, 43 Ohio St. 571. — A railway company carried freight for one of its customers at a rate very much less than the rate charged Scofield for the same services. This discrimination was injurious to the legitimate business of Scofield. This action was brought against the railway company to prevent the collection of the higher freight rates referred to.

(3) *Briggs* v. *Boston & Lowell R. R. Co.*, 6 Allen (Mass.), 246. — Briggs, whose place of business was at Racine, Wis., delivered flour to the Racine and Mississippi R. R. Co., taking from their agents a receipt in which they agreed to forward and deliver the flour to Franklin E. Foster at Williamstown in Massachusetts. By a mistake of the agents of the company, the flour was billed to Wilmington, where there is a freight station on the road of the defendants. In due time it was placed in the freight house of the defendant road at Wilmington, where the company could find no Franklin E. Foster to whom to deliver it. After two months the flour was sold by the railroad company and the funds retained by them. This action was brought to recover the value of the flour.

(4) *Morganton Manufacturing Co.* v. *River and Charleston Ry. Co.*, 121 N. C. 514. — A box of plate glass was shipped by the plaintiff company from New York City to Marion. In the regular course of transportation the shipment passed over several railroads, including the defendant railway company, which was the terminal carrier. When the shipment was received in Marion, it was found to be damaged. Evidence was given which proved that the defendant railway company had received the glass in good condition. This action was brought to recover damages, and the railway company refused to pay until the plaintiff could prove that the damages occurred on its road.

(5) *Pingree* v. *Detroit, Lansing & Northern R. R. Co.*, 66 Mich. 143. — The plaintiff, Pingree, shipped goods from Edmore *via* the defendant railroad company directed to Detroit, and took the usual bill of lading. While the goods were in Stanton *en route*, they were taken from the railroad company, by the sheriff, on an attachment against the parties from whom Pingree had bought the goods. This action was brought against the railroad company for their failure to deliver the goods at Detroit.

(6) *Steele* v. *McTyer*, 31 Ala. 667. — Defendant was a common carrier running a flatboat to Mobile. Plaintiff shipped 15 bales of cotton on defendant's boat. The boat was wrecked by running into a log. This action was brought to recover the value of the cotton.

(7) *Wooster* v. *Tarr*, 8 Allen (Mass.), 270. — Defendant, Tarr, shipped mackerel at Halifax upon plaintiff's vessel. In the bill of lading it was specified that they be delivered in Boston "Unto Howe & Co., or to their assigns, he or they paying freight for said goods." They were delivered to parties to whom Howe & Co. had sold and, as plaintiff could not collect freight from Howe & Co., who were insolvent, he brought this action against Tarr for the unpaid freight.

(8) *Satterlee* v. *Groat*, 1 Wend. (N. Y.) 272. — Defendant was for some time a common carrier between Schenectady and Albany, but had sold out all of his teams but one, which he used on his farm, and for a year or more entirely gave up the business of carrying. One Dows then engaged him to bring some loads for him from Albany to Schenectady. Groat sent his servant to bring these loads, expressly instructing him not to carry for any one else. When the servant went for the third load, it was not ready, and he, contrary to his instructions, took a load from plaintiff to be delivered to Frankfort. On the way, one box was broken into and the contents stolen. The servant was afterwards convicted of the theft. This action was brought against Groat, as a common carrier, for the loss due to an act of his servant.

(9) *Johnson* v. *The Midland Railway Co.*, 4 Exch. (Eng.) 367. — The railway company refused to transport five tons of coal for the plaintiff. The defendant railway company never carried coal and

did not hold itself out for any such business. It was proven that its equipment was designed for passenger service.

(10) *Klauber* v. *American Express Co.*, 21 Wis. 21. — Plaintiff shipped some clothing by the defendant express company. The clothing was not packed so as to be safe from damage by rain. This fact was apparent to the defendant company when they accepted the goods. While the clothing was being transported by defendant, it was damaged by rain. This action was brought to recover the damage.

(11) *Perkins* v. *American Express Co.*, 42 Ill. 458. — A package containing a wreath made partially of glass was given by plaintiff to the defendant company for transportation. The company was not notified of the nature of the goods shipped. During the transportation the goods were damaged. This action was brought against the company for the loss by breakage.

(12) *Yohe* v. *Ohio Railway Co.*, 51 Ind. 181. — A certain quantity of wheat was delivered to the railway company for transportation by the plaintiff. The wheat was not delivered at the proper time and place. This action was brought against the company for the value of the wheat. The company proved that one Johnson took out a writ of replevin, and by virtue of this writ, the sheriff of the county seized the grain and took it out of the possession of the company.

(13) *Moses* v. *Boston & Maine R. R.*, 32 N. H. 523. —

Ten bags of wool were delivered to defendant to be transported to Boston and then delivered to the consignee. The train arrived in Boston between 1 and 3 o'clock in the afternoon, and in the usual course of business two or three hours were required for unloading. The warehouse was closed at 5 o'clock, and during the night it burned. This action was brought to hold the railway company responsible, as common carriers, for the loss of the goods.

(14) *Dexter* v. *Syracuse Railroad Co.*, 42 N. Y. 326. — Plaintiff was a passenger on the defendant road, and his trunk was lost while being transported by said road. The trunk contained, aside from his wearing apparel, material for two dresses purchased for his wife, and also material for a dress intended for the landlady. This action was brought to recover for the entire contents of the trunk.

LESSON XLII

NEGOTIABLE INSTRUMENTS

77. In General.
78. Definition and Distinguishing Characteristics.
79. Kinds.
80. Defenses.

77. In General. — Much of the business that is transacted to-day is transacted without the immediate use of money. Credit plays a much larger part in modern business than currency. Since this is the case, it has become necessary to adopt some tangible representative of credit which can be freely passed from hand to hand, taking the place of money in the payment of debts. The law of negotiable paper has been based upon the Law Merchant, which was simply the established custom and practice of business men in dealing with each other in early times, sanctioned and perpetuated by decisions of the courts. In nearly all of the states a Negotiable Instruments Statute has been passed, embodying nearly all of the important features of that part of the Law Merchant applicable to negotiable paper, and making uniform many points of difference in the practice of the

various states. Much of the negotiable paper is made by parties in one state in favor of parties in another state, and the interstate character of transactions, in which negotiable paper is an important feature, requires that uniformity in the interpretation and handling of such paper be established by statutory enactments. New York state was the first to adopt a Negotiable Instruments Statute, and the other states that have adopted such a law have copied the New York state law, with a few modifications. Therefore, the law regarding negotiable paper is at present fairly uniform and much better adapted to the needs of modern times than is the old Law Merchant.

78. Definition and Distinguishing Characteristics. — A *negotiable instrument* is an unconditional promise or order in writing, signed by the maker or drawer, to pay a certain sum in money on demand, or at a fixed or determinable future time, and payable to the order of a person named therein, or to bearer.

In contracts, generally, it is the rule that the burden of proving consideration is upon him who asserts that he has a contractual claim against another. If A brings an action against B on a contract entered into between A and B, the burden of proving consideration is upon A, if B sets up no consideration as his defense. In the case of negotiable instruments there is an exception to this rule. Consideration is presumed, and it is necessary for one who sets up the defense of no consideration to prove that no con-

sideration existed, and, as we shall see later, the defense of no consideration is not available against a holder for value without notice.

Negotiability is the distinguishing characteristic of this kind of contract. According to this principle, one who becomes the lawful possessor of a negotiable instrument for value, before maturity, and without notice of any defects in it, can enforce the contract, even though the payee who transferred the instrument to him could not have enforced it because of personal defenses.

79. Kinds. — There are three principal kinds of negotiable paper: Bills of exchange, or drafts, notes, and checks.

A *bill of exchange* is the earliest form of commercial paper, and was made necessary by the unsafe means of transportation and the fact that business communities were widely separated. It is an order by one party, called the *drawer*, upon a second party, called the *drawee*, to pay a certain sum of money to a third party, called the *payee*, or to his order, directing that the amount be charged to the account of the one drawing the order.

A *note* is a written promise by one party, called the *maker*, to pay a certain sum of money, at a certain time, to a second party, called the *payee*, or to his order, or to bearer.

A *check* is a bill of exchange, drawn by a party who has money deposited in a bank, ordering the bank to pay a third party a certain sum of money and deduct

the amount from the amount on deposit to the credit of the drawer.

Bills of lading and *warehouse receipts* are semi-negotiable, in that they may be transferred by indorsement and delivery, and also by delivery alone in some cases.

Coupon bonds are bonds to which are attached interest coupons which are to be detached and presented for payment at stated times. These coupons are negotiable.

80. **Defenses.** — A person to whom a negotiable instrument has been properly transferred, before or at maturity, for value, and in good faith without notice of any defects in the instrument or imperfections in the title of the transferor, is said to be a *holder for value* or *bona fide holder*. One who derives title through a holder for value is also deemed to be a holder for value, even if he has not conformed to all the requirements of such a holder given in the preceding sentence. The title to the instrument becomes vested in such transferee, and he can bring an action for its enforcement in his own name.

There are two kinds of defenses, viz., *personal* and *absolute*. The personal defenses are those which are valid between the original parties to the negotiable instrument. Among others may be mentioned *no consideration*, *counterclaim*, and *fraud*, except such fraud as vitiates the entire contract. Fraud is generally a personal defense only, but is available to the maker as an absolute defense, if he can show that

he was not negligent in allowing himself to be defrauded.

The absolute defenses are those which may be used against any holder of negotiable paper, and are such defenses as *want of capacity*, *forgery*, and *alteration*.

If A gives a note to B without consideration and B holds the note until maturity, A would have no consideration as his defense, and such defense would be good. If, however, B transfers the note to a holder for value, the defense, no consideration, cannot be used by A, as it was personal against B only. The same would be true if A gave a note to B with consideration, and at maturity A refused to pay it on the ground that B owed him a similar amount. He could counterclaim and in this way avoid payment; but if B should transfer the note to a holder for value, A could not set up a counterclaim as a reason why he should not pay the transferee who holds the note at maturity. If A sells a horse to B by means of a fraudulent statement concerning the quality of the horse, and receives a note from B in payment, B could refuse to pay the note if A held it until maturity, on the ground that it had been secured by fraud. If A should transfer the note to a holder for value, such holder for value could enforce the note against B, as the defense of fraud in such cases is a personal one and does not affect the rights of a holder for value.

If A, an infant, gives a note to B, B could not enforce the note at maturity, as infancy is an absolute defense. The same defense would be good against

any one who might come into possession of the instrument. The same would be true in the case of forgery, or a material alteration in an instrument by a party to it.

LESSON XLIII

FORM AND DELIVERY

81. Form.
82. Delivery.

81. Form. — It is not necessary that negotiable instruments be written in any particular form. It is only required that the instrument be in writing and definite as to the names of the parties, amount, time and place of payment, and it must be in a form importing negotiability.

The writing may be done with any instrument and upon any material without affecting its validity or negotiability. All negotiable paper should be written in ink, to insure permanency and prevent alteration.

The promise to pay must be an unconditional one. If the promise is qualified in any way, the instrument will be valid as a contract, but not as a negotiable instrument, as the characteristic of negotiability will be destroyed.

The amount which is promised must be definite and must be payable in legal-tender money of the place where the promise is made. A written promise to

pay a certain amount in grain at the market price at the time of payment would not be a negotiable instrument, as the amount would be uncertain. It would be possible to determine the proper amount at the time when payment could be demanded, but this is not sufficient to satisfy the requirement as to certainty. The instrument must contain within itself all the necessary data for determining the amount, or must expressly state the amount that is to be paid.

The time of payment must be definitely stated or must be ascertainable from facts contained in the instrument. An instrument made payable at the death of a certain person, or upon the happening of any event which is sure to occur, may be a negotiable instrument, even though the day and date are not expressly stated. The time is sufficiently certain when the instrument is payable on demand, as the exact day of payment is optional with the holder, and is not, therefore, contingent upon the happening of some event which is beyond his control. When no time is stated in the instrument, it is held under the Negotiable Instrument Law to be payable on demand. When no date appears in the instrument, it is also held that the actual date of delivery is to be deemed the date of the instrument. Any holder will have the right to insert the proper date. If, under these conditions, an incorrect date is inserted, the promisor will be required to allow that date to stand if a holder for value acquires the instrument.

The place of payment should be definite and when

possible should be stated in the instrument. It is held that when no place of payment is mentioned, the place of business, or, in the absence of any place of business, the last-known residence of the maker or acceptor, will be the proper place to present the instrument.

The promise must be made to a certain person, his order, or to bearer. To fulfill this requirement, it is not necessary that the person be designated by name, but merely that a description be given by which the proper person to receive payment may be ascertained at the maturity of the instrument. For example, an instrument made payable to the treasurer of the General Electric Co. would be deemed payable to a definite person. Whoever happened to hold the office of treasurer of that company would be entitled to collect it. When no person is mentioned, it is held in many jurisdictions that the instrument is payable to bearer. Any person into whose hands the instrument comes lawfully has the right to insert his name as the payee.

Words of negotiability, such as order or bearer, must appear, to make the instrument negotiable. If these words, or similar words, are omitted, the instrument is valid as a contract, but is not negotiable paper.

82. Delivery. — Delivery by the maker or acceptor is essential to fix his responsibility. If, however, the completed instrument gets into the hands of the payee, no delivery will not be a good defense against

a holder for value. Such a defense would be good only against the person wrongfully taking possession of the instrument. Even in cases where much care has been exercised by the promisor in such an instrument, and in spite of such care the person designated as payee secures possession of the instrument, the promisor will be liable to a holder for value. It is proper that, where one of two innocent persons must suffer a loss, the one primarily responsible for the loss should be the one to stand it. A promisor who completes an instrument is running the risk that it will get into the possession of the party named in it and be used contrary to his intention. A partially completed instrument that is completed by one into whose hands it falls is sometimes held to be without validity, if it is apparent that the instrument was not prepared by the person whose name appears on it as maker or acceptor. If negligence is proved, such maker or acceptor will be liable.

LESSON XLIV

PROMISSORY NOTES

83. Kinds.
84. Parties.
85. Contracts of the Parties.

83. Kinds. — There are three kinds of promissory notes: several, joint, joint and several.

The *several note* is one that has but one maker.

The *joint note* is one that is made by two or more makers who assume joint responsibility on the note. In such notes it must be apparent that the liability was intended to be joint and not several. If a note, signed by two or more parties, reads, "I promise to pay," it is apparent that the liability was intended to be several. That is, each party assumed full responsibility on the instrument. The proper wording in joint notes is, "We promise to pay," or, "We jointly promise to pay." All makers in a joint note must be sued together, as they have a joint liability, and if one is released, the others are also released.

A *joint and several note* is one in which there are two or more makers who individually and collectively assume the responsibility for the payment of the note. As stated in the preceding paragraph, when two or more parties sign an instrument which reads, "I promise to pay," the liability of the makers is several. The proper wording for such a note is, "We jointly and severally promise to pay." In a joint and several note the holder may proceed against all as individuals, or any one or more of the makers.

84. Parties. — The parties to a promissory note are the *maker* and the *payee*. The maker is the one who promises to pay and the payee is the one to whom such promise is made. The payee may transfer the instrument by indorsement, as we shall learn in a subsequent section, and in such cases, he becomes an indorser, and the one to whom he transfers the instrument becomes the indorsee.

85. Contracts of the Parties. — As has been stated, the maker is absolutely liable on the instrument, and his contract is to pay the instrument when it is due, in accordance with its terms, and the contract of the payee is to accept the instrument as conditional payment of the obligation which the maker owes him. It is generally held that if the maker fails to pay the instrument at maturity, the payee may disregard the note entirely and proceed to bring an action on the original debt, or he may bring an action on the note which has been dishonored.

The contract of the indorser will be discussed in a later lesson.

LESSON XLV

BILLS OF EXCHANGE

86. Kinds.
87. Parties and their Contracts.

86. Kinds. - Bills of exchange or drafts are classified in several ways. They may be divided into two classes with reference to place. These two kinds are called *foreign* and *inland*. A foreign bill of exchange is one that is made payable outside of the state in which it is drawn. An inland bill of exchange is one that is payable in the same state in which it is drawn.

Drafts are also classified as *bank drafts* and *per-*

sonal drafts. A bank draft is drawn by one bank on another bank, in favor of a third party. It is usually payable at sight and its chief use is to make remittances from one place to another. Bank drafts may be purchased at any bank, and may be drawn on banks in New York, Chicago, Boston, or any other money center, according to the location of the drawing bank and the party to whom the draft is to be sent. A personal draft is one drawn by one person or firm on another person or firm. The personal draft is also divided into two classes, *two-party* and *three-party* drafts. A two-party draft is one in which the drawer orders the drawee to pay a certain sum of money to the drawer's order. This draft is used for collection purposes. A in Rochester owes B in Albany $100. B draws a draft on A in favor of himself for the amount of the debt and deposits it in an Albany bank for collection. The Albany bank forwards it to Rochester and collects it through its correspondent bank there.

A three-party draft is one in which one person or firm draws on a second person or firm, in favor of a third person or firm. This form of draft is rapidly going out of use. It was used to adjust debts between parties who lived in distant places, when conveniences for remitting money were not very numerous. A in Rochester owes B in Chicago a certain sum of money and C in Chicago owes A a like amount. A draws a draft on C in favor of B and remits it to B to present to C for payment. When C pays the

draft, he cancels his indebtedness to A and also A's indebtedness to B, without the transmission of any money through the mails.

Drafts are also classified as to time. They may be either *time* or *sight* drafts. A time draft is one that is made payable at a stated time in the future, either after date or after sight. When a draft is made payable after sight, the time does not begin to run until the drawee has signified by his acceptance that he will pay it when due.

A sight draft is one payable upon presentation or on demand. To hold the indorsers, it is necessary to present the draft within a reasonable time after it is received. What is a reasonable time will depend upon all the circumstances in any given case, but demand paper should rarely be allowed to run longer than sixty days, if there are indorsers.

A check has been defined as a draft drawn by a person having money on deposit in a bank, ordering that bank to pay, on demand, a certain sum of money to a designated payee. The drawee bank is obliged to honor a check, if the drawer has funds to his credit. In this respect the check is different from the ordinary three-party draft, as the ordinary drawee is under no obligation to pay unless he wishes to do so. A check should be presented for payment promptly, and if the payee does not present it for payment within a reasonable time, and the bank fails before presentment is made, he will be the loser, if the drawer had funds on deposit at the bank at the time of its failure.

The holder of a check who does not wish the cash at once, may take it to the bank on which it is drawn and have the cashier certify it. This is done by writing " accepted," or words to that effect, with the cashier's signature on the face of the check. When this is done, the credit of the bank is substituted for the credit of the drawer of the check, and in case of the bank's failure, the holder of the check will be the loser. Certification releases all indorsers. If the certification is procured by the drawer before delivering the check, he is not released and he will be the loser in case the bank fails before the holder has presented the check for payment, if negligence cannot be charged against the holder. But the effect of acceptance, when secured by the drawer, is to give the additional credit of the bank.

87. Parties and their Contracts. — The person or firm who orders the money to be paid is called the *drawer*. The drawer contracts to be responsible to the payee, or a holder for value, in case the drawee refuses to pay, or agree to pay, in accordance with the terms of the draft, providing he, the drawer, is notified promptly of such refusal on the part of the drawee.

The *drawee* is the person or firm who is ordered to pay the money. The drawee is not obligated either to pay, or to agree to pay, and may refuse to do either if he wishes. If he is willing to make payment in accordance with the conditions of the draft, he signifies his willingness by accepting it. This is

done by writing across the face of the instrument the word " accepted," with his signature, and in the case of drafts made payable after sight, with the date. From this time on, he is known as the acceptor and his liability is exactly the same as that of a maker on a promissory note. He has unconditionally promised to pay it and may be sued upon his failure to fulfill his agreement. The negotiability of the draft will be destroyed if the drawee, in accepting, makes payment conditional upon the happening of any event. For example, if he agreed to pay the draft "providing he was at the time of maturity indebted to the drawer," his contract would be good, but the negotiability of the draft would be destroyed. The same would be true if he stated in his acceptance that he would pay the amount " out of funds belonging to the drawer and in his possession at the date of maturity," as there would be no certainty that such funds would be in his hands at that time.

If the drawee named in the draft refuses to accept, a friend, or any third party, might accept the draft for him and become liable upon it. In such cases, the holder of the instrument at maturity would again present it to the designated drawee, and upon his failure to pay, would present it to the party who had accepted it. Such an acceptance is called an *acceptance for honor*, or an *acceptance supra protest.*

It sometimes happens that a drawee has previously agreed in writing to accept a draft drawn by a certain party on him for a specified amount. When

this is the case, the holder for value, or the original payee, who has taken the draft with knowledge of such previous promise to accept, does not need to have further acceptance, and the drawee will be liable on the draft the same as though he had accepted it in the usual way. Such an acceptance is called a *virtual acceptance*. Drafts drawn by persons on banks that have previously agreed to honor such drafts, as, for example, those drawn against a *letter of credit*, belong to this class. A letter of credit is an agreement by a bank to honor drafts drawn, under certain conditions, by a person named in the letter.

LESSON XLVI

NEGOTIATION AND INDORSERS

88. Definition of Negotiation.
89. Definition of Indorser.
90. Kinds of Indorsers.
91. The Contract.
92. Kinds of Indorsements.

88. Definition of Negotiation. — *By negotiation* is meant the transfer of a negotiable instrument by the original payee, or by a holder for value, by delivery, in the case of an instrument that is payable to bearer, or by indorsement and delivery, when payable to a certain person or his order.

When an instrument is indorsed and delivered to

another party, the one transferring it is called the *indorser*, and the one to whom it is transferred, the *indorsee*. The indorsement should be placed on the back of the instrument, across the left end, as near the top as is convenient, to allow for any subsequent indorsements that may be made. An indorser is not an ordinary surety or guarantor, as he is entitled to notice of dishonor by the maker or acceptor.

89. Definition of Indorser. — An *indorser* is one who writes his name on the back of a negotiable instrument and who is not in terms made an ordinary surety or a guarantor.

90. Kinds of Indorsers. — When the holder of an instrument writes his name on the back for the purpose of transferring the instrument in the regular course of business, he is said to be a *regular indorser*. When one who is not otherwise a party to the instrument places his name on the back for the purpose of guaranteeing the payment of the instrument, he is called an *irregular indorser*. There is some conflict in various jurisdictions regarding the exact contract of the irregular indorser, but in general he is held to be an indorser and has the same liability as the regular indorser, so far as his warranties on the instrument are concerned.

91. The Contract. — The regular indorser, when he places his name on the back of the instrument, makes a bill of sale of the instrument to the transferee, conveying to him all right, title, and interest which

the indorser may have in the instrument; he also makes the following warranties regarding the instrument:

(*a*) That all the parties whose signatures appear on the instrument have capacity to contract;

(*b*) that the signatures are genuine;

(*c*) that the instrument is regular on its face;

(*d*) that there are no defects which will interfere with its collection when it is due;

(*e*) that it will be paid according to its terms at maturity;

(*f*) that if it is not paid, the indorser will pay it, providing he is promptly notified of its non-payment.

92. Kinds of Indorsements. — The regular indorsement may be made in blank by simply writing the name of the indorser on the back. This makes the instrument payable to bearer. If the indorser writes the words, "Pay to the order of" a certain person, above his name, the indorsement is said to be in full. Further negotiation may be made by indorsement and delivery by the holder.

A *qualified indorsement* may be made by writing the words, "Without recourse," over the indorsement, and the effect of this is to make the contract of the indorser a bill of sale and a warranty on all points except that it will be paid at maturity. When this indorsement is used, the holder of the instrument must look to the principal debtor for payment. However, if there is a defect in the instrument, or the parties

have not capacity to contract, or the instrument is a forgery, the indorser is still liable on his warranty. If, however, the principal debtor becomes insolvent and does not pay the instrument, the holder cannot look to the indorser who has indorsed without recourse.

A *restrictive indorsement* may be made by writing "Pay to A only," over the indorser's name. This limits the further negotiation of the instrument. Merely indorsing with the words, "Pay to A," without adding the words, "Or order," does not restrict further negotiation. A special indorsement may also be made by writing the words, "For collection," above the indorser's name. This indicates that title to the instrument has not been surrendered but that the transferee is authorized to collect for the indorser, and to deliver the instrument as his agent.

In some cases a party places his name on the back of an instrument guaranteeing the happening of a certain event. For example, one may write on the back of an instrument, "I hereby guarantee the collection of the within instrument." If the instrument is not paid at maturity, the holder must proceed against the party primarily liable and use every possible legal means to effect collection. If, after exhausting all the means at his command, the instrument still remains unpaid, the guarantor of collection will then be liable. One who writes, "I hereby guarantee the payment of the within instrument," can

be proceeded against immediately upon the failure of the primary party to pay at the proper time.

Indorsers are individually liable in the order in which they sign their names on the back of the instrument, unless evidence can be produced tending to show that there was a different agreement between them. Since this is the case, release of one indorser by the holder will have the effect of releasing all subsequent indorsers. An extension of time by the creditor without the consent of the indorsers will release them.

If more indorsements are to be made on the instrument than can be made on the back, additional ones may be made on a separate piece of paper which is attached to the original instrument.

Proper notice is sent to the indorsers when it is mailed within twenty-four hours after the default, or, if the indorsers live in the same place, when it is mailed so as to reach them in the due course of mails within twenty-four hours after the default. If only one indorser is notified, and he notifies the others above him on the instrument, such notification may be made within twenty-four hours after receipt by each indorser, and such notification by indorsers to other indorsers will be sufficient to enable the holder of the instrument to proceed against any of them who have received notice either directly or through subsequent indorsers. It is always best to notify all the indorsers at the same time and thus avoid all possibility of releasing any of them by reason of failure to notify.

LESSON XLVII

PRESENTMENT AND DEMAND

93. Presentment.
94. Notice of Dishonor.
95. Legal Rate of Interest.

93. Presentment. — When a negotiable instrument becomes due, the holder should present it to the party primarily liable on it and demand payment. This is not necessary to fix the liability of such party, and an action can be brought against him on the instrument, without previous demand, any time within the time allowed under the Statute of Limitations, which is six years in most of the states. However, if no presentment and demand are made, no interest can be recovered from the time the instrument becomes due to the time of settlement. When presentment and demand are made, the holder may recover interest on the entire amount for the time it remains unpaid after it becomes due. It is also necessary to present the instrument and demand payment in order to fix the liability of secondary parties whose names appear on the instrument.

The presentment must be made at a proper time, usually during business hours, if the presentment is to be made at the place of business of the primary party. If the presentment is to be made at the place of residence of the one obligated to pay, any conven-

ient time during the day will satisfy the requirement as to the time of presentment. It is not necessary that presentment be made before the close of banking hours, unless the instrument is payable at a bank, in which case presentment would be made at a proper time if it was made at any time before the regular closing hour.

The place of payment should be designated in the instrument, but when no place of payment is designated, the instrument is payable at the place of business of the primary party, or, when no place of business is known, at his last-known place of residence. It has also been held that where no place of residence or business is known, the holder may present it at the place where the instrument was given and such presentment will be deemed to be at a proper place.

In making presentment and demand, it is necessary that the holder have the instrument with him and actually show it to the party upon whom demand is being made, in order that he may know that the holder is in a position to deliver the instrument upon receiving payment, and that he has the proper title to it. When the instrument has been lost or destroyed, the holder can demand payment, upon showing his willingness to give the primary party a bond of indemnity, to provide against any loss which might occur through the finding and presentation of the instrument by a holder for value. One who took an instrument from a finder for value, without knowledge that he had no title, would become a *bona fide*

holder. When an instrument is payable at a bank, presentment and demand are made by having the instrument at the bank with the knowledge of the officers of the bank, for the purpose of collection, at the date of maturity.

The presentation must be made to the primary party in person, if he can be found, at the proper place, and if he cannot be found, to any of his agents, servants, or representatives who may be found at that place. When it is a physical impossibility for the holder to present the instrument at the proper time and place, such delay will be excused upon presenting proper evidence of the impossibility, and also of the fact that the holder presented it promptly after the disability was removed.

It is also unnecessary to make presentment and demand when any of the parties, whose liability depends upon such presentment and demand, waive the right to have notice of presentment and demand. The waiver is usually made by writing words to that effect over the indorsement.

Three days of grace were formerly allowed in all states on drafts and notes, and while the custom has been discontinued in most states, in a few states grace is still allowed. Where days of grace are allowed, presentment and demand must be made on the third day after the date of maturity. If this third day is Sunday or a legal holiday, the instrument is payable the next preceding business day. Where no days of grace are allowed, an instrument maturing on Sun-

day or a legal holiday will be payable on the next succeeding business day. Saturday is considered a holiday in the case of instruments made payable at a bank that is open only until noon Saturdays.

In computing the time to find the due date of an instrument that reads a certain number of days after date, the actual number of days must be counted, excluding the day when it was made and including the due date. If the time is a certain number of months after date, the instrument will become due on the same day, or as near that day as possible, in the proper month. For example, a note made January 30, 1913 for one month would have been due February 28, 1913. If it had been made for thirty days, it would have been due March 1, 1913.

94. Notice of Dishonor. — When an instrument is presented for payment and payment is refused, the holder should immediately notify the indorsers or secondary parties of such dishonor, in order that he may hold them liable upon the instrument. If there are two or more secondary parties, it is best to notify them all. If the last one is notified, he should in turn notify the other indorsers whose names appear above his. Such notice by one indorser to another will have the same effect, as far as the holder is concerned, as if he had personally notified each indorser instead of only one. When the instrument is a foreign bill of exchange, it is necessary to send a formal notice of dishonor in the form of a *notice of protest*. This notice of protest is a notice sent by a

notary public stating that presentment has been made, payment refused, and that the holder looks to the indorser for payment. When notice is waived, the formality of protest may be dispensed with. A waiver of protest also waives the right to be notified.

It is usually held that a notice to be sent within the proper time must be dispatched within twenty-four hours after the dishonor has taken place, or if the party to whom it is sent lives in the same place, it must be sent so that it should reach him within the twenty-four hours. If the holder does not know the whereabouts of the secondary party, he may mail the notice to his last known place of residence or business.

95. Legal Rate. — In every state a *legal rate* of interest has been established, and in all cases where interest is agreed upon but no definite rate is mentioned, the legal rate can be recovered. This rate can also be collected on all debts which remain unpaid after the date of maturity. In many states a maximum rate has also been established and any rate of interest above this maximum rate is considered *usury*. The penalty for usury varies in the different states. In some states interest above the legal rate is forfeited; in others all interest is forfeited, and in still others the interest and principal are both forfeited.

LESSON XLVIII

96. Cases on Negotiable Instruments.

(1) *Chicopee Bank* v. *Philadelphia Bank*, 8 Wall, 641. — A draft was sent to the bank in a letter, for collection. When it was brought from the post office to the bank, it was laid down with other papers on the cashier's desk, and before being taken up by the cashier it slipped through a crack in the desk and disappeared. The date of maturity passed and it was proved by the party primarily liable that no presentment and demand had been made to him. By the terms of the instrument it was payable at the bank. Was there a proper presentment and demand?

(2) *White* v. *Cushing*, 88 Me. 339. — This action was brought by the indorsee of an order in the following form:

$120.00 Piscataquis Savings Bank.

Pay to James Lawler, or order, ~~~~~~~~~~~~~~~~~~~~

One hundred twenty ~~~~~~~~~~~~~~~~~~~~ Dollars.

Charge to my account on book.

No.____ J. N. Cushing.

Witness: The bank book of the depositor must accompany this order.

It was contended that this instrument was not an unconditional order, and this action was brought to determine this fact.

(3) *Redman* v. *Adams*, 51 Me. 429. — The draft upon which this case was founded read as follows:

"For value received please pay to the order of F. G. and C. A. Tilden, $40., and charge the same to whatever may be due me for my share of the fish caught on board the schooner 'American Star' for the fish season of 1860."

The question was raised as to whether this instrument was an unconditional order.

(4) *Rice* v. *Rice*, 43 App. Div. N. Y. 458. — This action was founded upon an instrument which was made payable at the death of a certain person and this case was tried to determine whether the instrument was payable at a definite time within the meaning of the statute.

(5) *Cowing* v. *Altman*, 71 N. Y. 435. — This was an action founded on an instrument that had no date. The question involved in the case was the date of maturity.

(6) *Russell* v. *Langstaffe*, 2 Doug. (Eng.) 514. — A certain person indorsed his name upon the back of certain checks, blank as to amount, date, and time of payment. The checks were filled in by the person to whom the indorser gave them with amounts, dates, and time of payment different from those authorized, and were negotiated to Russell, a *bona fide* holder. The indorser refused to pay on the ground that the instruments had been improperly filled out.

(7) *Brown* v. *Reed*, 79 Pa. St. 370. — T. H. Brown signed an instrument in the following form:

North East, April 3, 1872.

Six mos. after date I promise to pay J. B. Smith or order Two Hundred and Fifty Dollars for value received with legal interest, without defalcation or stay of execution.

bearer $50 when I sell by worth of Hay & Harvest Grinders, appeal, and also without

T. H. Brown, Agent for Hay & Harvest Grinders.

The instrument was torn apart at the vertical dotted line and the left-hand portion was discounted for J. B. Smith. Brown refused payment on the ground that he had never signed such an instrument. This action was brought to test the merits of the case.

(8) *Smith* v. *Smith*, 1 R. I. 398. — This action was founded on an instrument in which the amount expressed in words was Three hundred seventy-five and ninety-four hundredths dollars. The amount expressed in figures was $175.94. The clerk of the bank discounting the instrument altered the figures to make them correspond with the words, and the defendant insisted that this alteration made the instrument void.

(9) *German American Bank* v. *Milliman*, 31 N. Y. Misc. 87. — Milliman was the maker of a note which was payable at the German American Bank. On the date of maturity the payee called several times to ascertain whether Milliman had made payment, but found that he had not done so. About fifteen minutes before closing hour, the bank was instructed to protest the note for non-payment. Five minutes before closing time, Milliman appeared and offered to

pay the note, but the bank refused to accept payment without receiving the protest fees also. Milliman refused to pay the protest fees, and this action was brought to determine whether the bank was justified in protesting the note.

(10) *Coolidge* v. *Payson*, 2 Wheat. (U. S.) 66. — A letter was written by a debtor describing a draft in terms that could not be mistaken and promising to accept it if drawn. The draft was drawn in conformity with this previous written statement of the debtor and was given to the payee together with the letter. Afterwards the drawee refused to honor the instrument on the ground that he had not accepted it. This action was brought to determine whether he had the right to refuse payment on this ground.

(11) *Thompson* v. *Sloan*, 23 Wend. (N. Y.) 71. — In this case a note was made and dated at Buffalo, N. Y. for $2500 payable, twelve months after date, at the Commercial Bank of Buffalo, N. Y., in Canadian money. The instrument was properly signed and was made in favor of a designated payee. It also contained the words of negotiability. This action was brought to determine whether it was a negotiable instrument or not.

(12) *Shaw* v. *Smith*, 150 Mass. 166. — Eugene Bridgman made an instrument in writing July 19, 1873, which read as follows: "For value received, I promise to pay F. B. Bridgman's estate or order $126 on demand with interest annually." F. B. Bridgman died and the plaintiff in this case was appointed ad-

ministrator of his estate. This action was brought to recover on the instrument as a negotiable note. Does the instrument contain all the essentials required to make it negotiable?

(13) *Richardson* v. *Carpenter*, 46 N. Y. 660.—The instrument upon which this action was based read as follows: "Please pay A or order $500, for value received, out of the proceeds of the claim against the Peabody estate now in your hands for collection, when the same shall have been collected by you." For certain reasons it was contended by the defendant in the case that this was not a negotiable instrument. What should be the holding in this case?

LESSON XLIX

(1) *Kelley* v. *Hemmingway*, 13 Ill. 604.—David Kelley made the following instrument in writing at Castleton, April 27, 1844: "Due Henry D. Kelley $53, when he is 21 years old, with interest." It was proved by the plaintiff in the case that Henry D. Kelley became of age before this action was commenced. The only question involved in the case is one of negotiability.

(2) *Matthews & Co.* v. *Mattress Co.*, 87 Iowa, 246.—This action was brought on a promissory note against the Dubuque Mattress Company and John Kapp. The note read, "We promise to pay," and was signed, "Dubuque Mattress Company,

John Kapp, Pt." It was shown that the "Pt." was an abbreviation used for president. Was Kapp personally liable on this instrument?

(3) *Grange* v. *Reigh*, 93 Wis. 552. — After banking hours on July 20th, Reigh wrote a check for $1211 upon the South Side Savings Bank of Milwaukee and delivered the same to plaintiff, who also resided in Milwaukee. The check was not presented on July 21st, although the bank was open and would have paid it at any time during banking hours of that day. The bank did not open its doors July 22d, nor any day thereafter, having become insolvent. This action was brought to recover the amount covered by the check from Reigh.

(4) *Minot* v. *Russ*, 156 Mass. 458. — Russ, on October 29, 1891, drew a check on the Maverick National Bank payable to plaintiff, who informed him that the check must be certified by the bank before it would be received. On the same day, defendant presented it at the bank for certification. The bank wrote on the face of it, "Maverick National Bank. Pay only through clearing house. J. W. Work, Cashier. A. C. J., Paying Teller." On October 31st, after certification was secured, the check was delivered to the plaintiff for a valuable consideration. The bank stopped payment Monday morning, November 2d, before the plaintiff had had reasonable opportunity to present the check. This action was brought to recover the amount of the check from the defendant upon the failure of the bank to pay.

(5) *Head* v. *Hornblower*, 156 Mass. 458. — This case was decided by the same court and at the same time as the preceding case of *Minot* v. *Russ*. On Saturday, October 31, 1891, the defendant drew a check on the Maverick National Bank, payable to plaintiff, and delivered it. As the check was received too late to be deposited by the plaintiff for collection in time to go through the clearing house that day, the plaintiff secured certification of the check by the bank in the following form: "Maverick National Bank. Certified. Pay only through clearing house. C. C. Domett. A., Cashier." As was said in the preceding case, the Maverick Bank did not open its doors November 2d. When this check reached it through the clearing house, it was dishonored, owing to the insolvency of the bank.

(6) *Barnes* v. *Vaughan*, 6 R. I. 259. — The defendant was the indorser of a note which was made by Northrup and in which no definite place of payment was named. The plaintiff left the note at the Mt. Vernon Bank in Foster for collection. When the note came due, the only demand that was made upon the maker, Northrup, was in the form of the usual printed bank notice, which was mailed to Northrup by the cashier and directed to Providence, where Northrup was known to have been living in the early part of the month in which the note came due. It was shown that he did not live at Providence at the date of maturity of the note and that the notice did

not reach him. This action was brought to hold Vaughan liable as indorser upon the note.

(7) *Farnsworth* v. *Allen*, 4 Gray (Mass.) 453.—The holder of a certain negotiable instrument did not know the place of residence of the maker and gave the instrument to a notary for collection. The notary, after making due inquiry, ascertained the maker's place of residence and arrived there at nine in the evening. The maker and his family had retired for the night, but he answered the bell, and upon the note being presented, refused payment. This action was brought to recover the amount of the instrument from the indorser who contends that there was no proper presentment.

(8) *Simpson* v. *Turney*, 5 Humph. (Tenn.) 419.—A certain bank was the holder of a promissory note payable at said bank, made by James H. Jenkins and Anthony Debrell, and indorsed as follows: "A. Debrell, S. Turney, John W. Simpson." Turney lived within one mile of the bank. The note matured on February 1st and was protested on that day. On February 3d notice was sent to Turney from the bank. Simpson, the next indorser after Turney, had been notified of the failure of the maker to pay the note but gave no notice to Turney, the prior indorser. Simpson, after paying the note, brought this action against Turney to recover the amount paid.

(9) *Smith* v. *Poillon*, 87 N. Y. 590.—In this case a holder notified a third indorser on an instrument and

inclosed with it notices for the second and first indorsers. The third indorser sent the notice to the second and inclosed a notice for the first. The second indorser received his notice on the 6th and mailed the notice to the first indorser on the 7th in time to go on the mail leaving at 1.30 P.M. It was shown that there was an earlier mail leaving at 9.30 A.M., and the defendant who was the first indorser contended that the notice should have been sent by that mail.

(10) *DeWitt* v. *Perkins*, 22 Wis. 473.—The plaintiff, DeWitt, was acquainted with Perkins, the defendant, and knew that he was a responsible party. DeWitt purchased, shortly before maturity, a promissory note made by Perkins for $300, and paid $5 for it. On the trial it appeared that the note was void for want of consideration as between the original parties. DeWitt claimed he was a *bona fide* holder for value, and as such, was entitled to recover on the note.

(11) *O'Callaghan* v. *Sawyer*, 5 Johns (N. Y.), 118.—The plaintiff in this action was the indorsee of a note made by defendant. Defendant offered to prove a counterclaim as his defense and proved that, at the time of the transfer of the note to the plaintiff, it was long overdue.

(12) *Chapman* v. *Rose*, 56 N. Y. 137.—Rose entered into a contract with a person by the name of Miller to act as agent for the sale of a hay fork, and a contract was signed by both. Rose also signed an order for one hay fork. Miller then presented another

paper to Rose, saying that it was a duplicate of the order. Rose signed it without reading it or examining it. It later appeared that the second paper signed by Rose was a promissory note instead of a duplicate of his order. The plaintiff in this case purchased the note for value before maturity and in good faith, and now seeks to recover on it.

(13) *Draper* v. *Wood*, 112 Mass. 315. — A promissory note was made by George A. Wood and H. S. Higgins and read, "For value received I promise to pay L. L. Draper or order $1000 on demand, with interest." Higgins refused to pay the instrument on the ground that Wood, without Higgins's knowledge, changed "I" to "We" and added the words, "at 12%." It was proven that Wood made the changes in good faith but without consulting Higgins. Draper brings this action as payee of the instrument.

LESSON L

INDEMNITY CONTRACTS — FIRE INSURANCE

97. Definition.
98. Parties and the Contract.
99. Insurable Interest.
100. Application for Insurance.

97. Definition and Explanation. — *Fire insurance* is a contract of indemnity against damage to property by fire. The risk involved in the ownership of buildings is so great under modern conditions, that individual owners do not care to assume the risk alone. Insurance companies have been organized for the purpose of carrying a part of the risk for a stipulated sum called the *premium*. There are two kinds of companies called *mutual* and *stock*. In the mutual company all of the persons whose property is insured contribute a *pro rata* amount to pay the losses that are sustained by any of them, and the expenses of conducting the business. Each person carrying insurance has a right to vote for officers in a mutual company.

A stock insurance company is one that is organized by individuals to conduct the business of insurance

for their joint profit on the same general plan as any other business. A definite premium is charged those who insure, and whatever is left, after the losses and expenses are paid, is distributed among the stockholders of the company in the form of dividends.

98. Parties and the Contract. — The company that issues the insurance policy is called the *insurer* and the person whose interest is being protected by the insurance is called the *insured.*

The contract between the insured and the insurer is known as a *policy* when it is reduced to writing. Except in states where by statute the contract is required to be in writing, it may be oral. It is not necessary that the policy be actually written and delivered, so long as the agreement has been entered into and, when required, has been evidenced by some memorandum. For example, A goes to B, an insurance agent, and makes an agreement with him for an insurance policy on his house. All of the essential conditions are agreed upon and the premium stated, whereupon B, upon receipt of the premium from A, hands him a temporary receipt, and all that remains to be done is to prepare and deliver the policy. The insurance is in force from that time, and, if the building should burn before the company has forwarded the policy, the insured can collect the amount lost, or such a part of it as is covered by the insurance agreement. In order to secure uniformity, a standard policy has been adopted in a great many of the states. It often happens that

several companies carry insurance on the same property, and as will be seen later, they share the loss, in case of its destruction, in proportion to the amounts of their policies. Since this is done, it is very desirable that all policies be alike in their principal provisions.

99. Insurable Interest. — No person may take out insurance who has not an insurable interest in the property to be insured. Any person who sustains such a relation toward property that its destruction would entail a financial loss is said to have an insurable interest. If persons who have no insurable interest in the property were allowed to insure it, a premium would be put on the destruction of the property, and mere speculation would be encouraged. This would not only tend to interfere with the rights of individual owners, but would also tend to endanger the property of the entire community.

Several people may have an insurable interest in the same property. For example, A owns a house and rents it to B. C has a mortgage on the house. In case the house is destroyed by fire, A, B, and C would all lose. This gives each an insurable interest which may be protected by insurance. In case the house were destroyed and A only had an insurance policy upon the house, he only would be entitled to recover on that policy. The lessee and mortgagee should protect their interest by separate policies, but in the case of mortgaged property the policy usually states that the insurance shall be

payable to the mortgagee as his interest may appear.

100. **Application for Insurance.** — When an application is made for insurance, a description of the property is given, including location, materials of which it is built, use that is made of it, ownership, etc. When these statements regarding the property are made separately from the contract of insurance, they are known as representations and need be only approximately true. If, however, they are made in a formal application which is incorporated into and made a part of the policy, they become warranties, and must be literally true. If any warranty is untrue, the policy will be avoided. For example, A is insuring his warehouse. In the conversation between himself and B, he is asked, "How far from the warehouse is the nearest railroad track?" He replies, "Fifty feet." If, after the policy has been issued, it is found by measurement that the track is forty feet from the warehouse instead of fifty feet, this inaccuracy will have no effect upon the policy. If, however, the statement that the building was fifty feet from the track had been made in the formal application for insurance in reliance upon which the policy had been issued, and the application had been made a part of the policy, a slight inaccuracy of even one foot would be sufficient to avoid the policy.

LESSON LI

FIRE INSURANCE — Continued

101. Important Clauses.
102. Renewal.
103. Proof of Loss.
104. Summary.

101. Important Clauses. — The standard insurance policy insures against loss by fire. This includes damage done by water used in an attempt to extinguish fire, and also loss which occurs through the stealing of property after it has been removed from the building, providing the owner had used due care in protecting it. For example, the furniture is removed from a burning house and before a guard can be placed over it, some valuable pieces are stolen. The owner is entitled to recover the value of the stolen property on the insurance policy. If, however, the property is left in the street unprotected for an unreasonable time, and loss occurs, no insurance can be recovered.

Lightning clause. — The standard policy does not insure against loss which occurs through lightning where ignition does not result. If lightning strikes a building and sets fire to it, the damage can be recovered without a special lightning clause, but if it merely damages the property without setting fire to it, no insurance can be recovered. There is some-

times added a lightning clause which provides that loss by lightning may be recovered.

Pro rata clause. — The standard policy contains the *pro rata* clause which provides that where more than one company is carrying insurance on a piece of property, each will pay such a part of the loss as his insurance is of the whole insurance at the time of the fire. It should be stated, however, that the standard policy further provides that additional insurance with other companies may not be taken out without the consent of the first company. This is to prevent overinsurance. It is against public policy to permit owners to insure their property for all or more than it is worth. Overinsurance tends to make people careless with their property and may also encourage dishonest persons to destroy it for the insurance.

Vacancy clause. — It is usually provided that if the property remains vacant and unoccupied for a certain length of time, usually ten days, the policy shall become void. This does not apply to temporary absence on a visit, but, if an owner is to be away from his property for a considerable length of time, he should go to his agent and secure a vacancy permit which will be granted to him and which may be attached to his policy.

Alienation and cancellation clause. — Another clause provides that if there is any change in interest, title, or possession, the policy becomes void unless the company assents to such change. It is better, how-

ever, to have the policy canceled under the *cancellation* clause which provides that the insured may request the cancellation of a policy at any time upon giving the company notice, and the company may also cancel the policy at any time upon giving notice. When a policy is canceled under the cancellation clause, the insured is entitled to a refund of such part of the premium as has not been earned.

Rebuilding clause. — It is usually provided that in case of total destruction of the property the insurance company shall have the right to rebuild, and under this clause the company may rebuild instead of making payment in money for the loss.

102. Renewal. — When the term of insurance has expired, it is customary to renew the policy by having a brief renewal receipt attached to the old policy giving it effect for a new term. This does away with the necessity of writing a new policy covering the same property.

103. Proof of Loss. — Immediately after loss has occurred it is necessary for the owner to file his claim, together with proof of loss, with the company through their agent. In important cases the company will send an adjuster whose business it is to ascertain the exact extent of the loss and report his finding as a basis for settlement. It should be emphasized that, no matter how much insurance is carried on the property, nothing can be recovered

beyond the amount of loss which can be actually proved. In view of this fact, it is very desirable that one having property insured, particularly personal property, should prepare and keep on file an inventory showing exactly the amount and value of the property. When this is done, it is a comparatively easy matter to prove the entire loss, otherwise many items may be forgotten and only partial loss be recovered.

104. Summary. — In fire insurance the one seeking insurance should know the agent and the company, and he should thoroughly understand his policy in accordance with the terms of which settlement will be made in case of loss.

LESSON LII

LIFE INSURANCE

105. Definition and Explanation.
106. Parties and the Contract.
107. Insurable Interest.
108. Application for Insurance.

105. Definition and Explanation. — *Life insurance* is an indemnity against loss occurring through the death of a person. A company agrees to assume the risk of loss upon payment of a certain amount, called a *premium*, and the amount of insurance may be paid

in one sum upon the death of the insured, or in installments which may continue for a stated length of time. There are a great many different forms of insurance, and the cost depends upon the risk involved, and the plan according to which the insurance is to be paid.

106. Parties and the Contract. — The person whose life is insured is called the *insured*, and the company who undertakes to pay the indemnity in case of loss is called the *insurer*, and the one for whose benefit the insurance is taken out, is called the *beneficiary*. It is very important that persons who insure their lives should understand that the policy which is given them is a contract between the company and themselves, and that agents have no authority to vary the terms of this contract in any particular. One who receives an insurance policy should read it very carefully and be sure that he understands all its terms.

107. Insurable Interest. — An insurable interest exists when one person would suffer a financial loss upon the death of another person. A creditor may insure the life of his debtor, or a son or daughter may insure the life of a parent. No one who has no insurable interest can insure the life of another. Insurable interest must exist at the time the insurance is taken out, but the insurance may be continued even though the insurable interest has ceased to exist. A debtor whose life has been insured by

his creditor may pay his debt and in this way extinguish the insurable interest of the creditor in his life, but this does not prevent the creditor from continuing the insurance in order that he may ultimately receive back what the insurance has cost him.

108. Application for Insurance. — An application for insurance is usually made on a blank form provided by the insurance company. Questions are asked concerning the health of the applicant, the kind of work in which he is engaged, his family history, and all other matters which would tend to affect the risk. An applicant must be very careful, in answering these questions, that he does not deviate in any degree from the exact truth. The application is made the basis for the insurance contract, and the application is also made a part of the insurance policy. Every answer given in the application is a warranty and must be literally true. In case any answers are incorrect, the policy will be void immediately. If any of the questions contained in the application blank are not answered, and the company issues the policy without requiring answers to them, it is understood that the company has waived its right to have the questions answered, and the policy will not be affected by the applicant's failure to answer. One who is not in good health should not apply for insurance until fully restored to health, as it is quite certain that any reliable company will reject his application if evidence of poor health is found, and

once having been rejected, it becomes more difficult to secure insurance thereafter.

LESSON LIII

LIFE INSURANCE — CONTINUED

109. KINDS OF INSURANCE.
110. SURRENDER VALUE.
111. SUMMARY, AND CASUALTY INSURANCE.

109. Kinds of Insurance. — There are many different kinds of insurance policies, and in taking out insurance, one should be very careful to understand the nature of the policy which he is purchasing. Any statements made by the agent regarding the conditions or terms of insurance are of no effect, as far as the company is concerned, if they are not incorporated in the policy that is issued by the company and accepted by the applicant. The life insurance agent has much less authority than has the fire insurance agent, and life insurance does not take effect until the policy is issued and the premium paid or arranged for in accordance with the rules of the company. Among the more important kinds of life insurance policies are the following:

Straight Life Policy. — This policy provides for the payment of a certain sum to the beneficiary upon the death of the insured, providing premiums shall be paid at stated intervals during the life of the in-

sured, and the policy shall not be avoided for any reason prior to the death of the insured.

Endowment Policy. — The Endowment Policy is one which provides for the payment of a certain sum of money to the insured at the expiration of a given time, or to a designated beneficiary, in case the insured dies before the expiration of the endowment period, provided the premiums have been paid in accordance with the terms of the contract. This kind of insurance is more expensive than the other kind as it is payable at the expiration of a given time rather than at the death of the insured which may occur many years after the endowment period has been passed.

Limited Payment Life Policy. — The Limited Payment Life Policy is one which provides for the payment of a certain sum, at the death of the insured, to a designated beneficiary, upon condition that annual premiums shall be paid each year for a specified number of years, or until the death of the insured, if he dies before the expiration of that time. For example, a twenty-payment life policy is one in which the insured pays an annual premium every year, for twenty years, at the expiration of which time the policy is paid up and no more premiums can be called for. The beneficiary, however, does not receive any money from the company until the death of the insured. The advantage of this form of insurance is that the premiums are paid during the earlier years of the insured's life and thus protection is secured for his family before his earning capacity has become less.

In nearly all kinds of insurance the policy may provide for payment on the installment plan rather than in a lump sum. An insured may designate that his beneficiary be paid so much per year instead of being paid a certain amount at his death, and when this form of payment is contracted for by the insured, the premiums are slightly smaller than when the payment is to be made at one time. In this way one may secure a life income for those dependent on him and guard against the possibility of loss through poor investments of insurance money.

110. Surrender Values. — In all policies written by the best life insurance companies to-day, there are *surrender value* tables given at the end of the policy. In these tables it is provided that upon the surrender of the policy any time after two or three years, a certain amount of cash can be received for it from the company. This is known as the *cash surrender value*. An equal amount of cash can be borrowed from the company upon sending the policy to them for indorsement. This is called the *loan value*. This loan will draw a stated amount of interest and can be paid off at any time at the option of the insured. The table also provides that the insured may surrender the policy at any time, and, in its place, take a *paid-up policy* in which the company agrees to pay a certain amount to the beneficiary, at the death of the insured, without the payment of further premiums. Another option provided for in the table is what is known as *extended insurance*.

Under this option, if the insured fails to pay the premiums when they become due, the policy will be carried without further payment for a certain length of time specified in the table. If, for example, A has paid twenty annual premiums on a life policy and then ceases to pay any more premiums, the policy will be continued by the company, in full force, for so long a time as the surrender value at the date of default in the payment of premium will carry it. It will be understood, from the study of this table, that the policy does not cease to have value if the premiums are not paid, as was the case before these options were given.

One of the four options referred to above is automatic, and it is important that a policy holder study his policy carefully and ascertain which one of the four is the automatic one. In some policies, if the premium is not paid when due and no choice is indicated by the insured, the company will immediately consider the policy as being carried on the extended insurance option. Other policies provide that when no choice is made and the premiums are not paid, the paid-up policy is to be substituted for the one which has been allowed to lapse. All modern policies provide for a certain number of days in which to pay the premium, without interest, and the provisions of the policy, in this and all other matters, should be thoroughly understood by the insured.

When the policy is made out in favor of the insured, it is payable to his estate upon his death, and may be

attached the same as any other property for the benefit of his creditors. If it is made out in favor of another person as the beneficiary, the insured's creditors cannot reach it, and the insurance money cannot be paid to any person other than the one specified in the policy. The beneficiary has a vested interest at once, which he may assign and which is subject to his debts, and, unless otherwise provided in the policy, it is necessary to secure his consent if the insured desires to change the beneficiary. If the beneficiary dies before the insured, and no other beneficiary is substituted by the insured, the policy becomes payable to the beneficiary's personal representative, unless otherwise provided in the policy.

111. **Summary, and Casualty Insurance.** — Before buying insurance, decide whether you wish to buy for protective or investment purposes, and then select the kind of policy that will give you the maximum protection or investment return, according to your choice, at the least cost consistent with safety. Select your company with great care and analyze your policy before accepting and paying for it, to satisfy yourself that you are getting what you contracted for.

Casualty Insurance is a form which acts as an indemnity against loss resulting from personal injury, or from the destruction of certain kinds of property, or from certain obligations which one may have toward another.

Among the different kinds of casualty insurance are the following:

Accident Insurance. — In this branch of insurance the policy provides for the payment of a certain amount upon the death of the insured by reason of an accident. In case of accidental injury resulting in loss of time and expense for medical service, the policy usually provides for the payment of a certain weekly indemnity and certain other amounts for surgical operations, hospital expenses, etc.

Employers' Liability Insurance. — An employer of men in a manufacturing business very often is sued for damages by one of his employees who has been injured while in his service. It is customary for large employers of labor to insure against the possibility of having to pay such damages. Such insurance is called employers' liability insurance. When an accident occurs in the factory of one carrying such insurance, an action brought against the employer for damages is defended by the insurance company, and, if the employer is defeated, the insurance company pays the loss.

Fidelity Insurance. — One who is employed in a position of responsibility and trust is frequently required to furnish bonds to his employer as a guaranty that he will perform his duties honestly. Formerly, responsible individuals guaranteed the honesty of the employee. At the present time, insurance companies assume the risk, upon the payment of a certain premium by the insured employee.

Credit Insurance. — Experience shows that, in nearly every business in which goods are sold on

credit, a certain per cent of the goods are never paid for, through the insolvency or dishonesty of some of the debtors. To provide against this loss, it is customary to pay an indemnity company to assume the risk of such losses.

Title Insurance. — It is often difficult to trace the title to real property satisfactorily, and when this is the case, the purchaser insists on having the title to the property insured. The insurance company makes a careful investigation, and if satisfied that the title is clear, insures the property against liens or incumbrances.

Elevator Insurance. — It is customary for owners of buildings in which passenger elevators are located to insure against loss as a result of accident in the use of the elevator. This includes loss as a result of injury to persons riding in the elevator and also damage to the elevator itself.

Marine Insurance. — Owners of vessels, or of goods shipped thereon, that are exposed to maritime perils, usually insure themselves against loss therefrom. Though known as "Marine" insurance, the contract is frequently extended to cover risks on inland waters, and covers, besides perils of the seas, war perils, loss by pirates, thieves, captures, seizures, jettisons, barratry, etc.

There are a great many other kinds of insurance, and it may be stated that, wherever there is a possibility of financial loss, the risk of such loss may be covered by casualty insurance of one kind or another.

LESSON LIV

112. Cases on Insurance

(1) *Cross* v. *National Fire Insurance Co.*, 132 N. Y. 133. — The plaintiff had a building conveyed to him in trust, to sell it and distribute the proceeds, after deducting his commission. He agreed to care for the property, rent it, and keep it insured pending a sale. The building was insured in the name of "Sidney S. Cross, Trustee." The building burned and the insurance company refused to pay the amount of the policy on the ground of lack of insurable interest.

(2) *Huber* v. *Manchester Fire Assurance Co.*, 92 Hun (N. Y.), 223. — The plaintiff insured the furniture in her house for $1500. The policy contained a provision that the entire policy should be void if the building described was or became vacant or unoccupied and so remained for ten days. On the 24th of August, the plaintiff went away on a visit, intending to be away five or six weeks. Before she left, she arranged to have the house papered and painted, and a friend of hers went to the house frequently to see how things were. The house and furniture burned on September 18th, and the plaintiff brought suit on her policy.

(3) *Germania Fire Insurance Co.* v. *Home Insurance Co.*, 144 N. Y. 195. — The defendant issued a policy of insurance to one Verdier on his stock of

hardware, the policy containing a provision that if the property was sold or transferred, or a change took place in title or possession, the policy should be void. During the life of the policy, Verdier formed a partnership with one Brown, selling him a three-tenths interest in the insured property. The hardware was destroyed by fire, and the plaintiff sued on the policy as assignee of Verdier.

(4) *Kenniston* v. *Merrimac County Mutual Insurance Co.*, 14 N. H. 341. — The plaintiff insured his house with the defendant, the terms of the policy being to pay for any loss by fire caused by accident, lightning, or any other means except design, invasion, or insurrection. The house was struck by lightning, different parts of it were materially injured, articles of glass, china, etc., were broken, and at the place where the lightning struck, the wood was discolored and blackened as by fire. The defendant refused to pay the loss, claiming that it was not covered by the policy.

(5) *Boruszweski* v. *Middlesex Mutual Assurance Co.*, 186 Mass. 589. The plaintiff insured his house and barn with the defendant, the policy being in the usual form. The premises burned, but the company did not pay the loss on demand. The plaintiff then brought suit on the policy, without taking any other steps to secure payment.

(6) *Walker* v. *Larkin*, 127 Ind. 100. — Larkin insured his life for $1000. The policy was an endowment policy, payable in twenty years. Walker ob-

tained two judgments against Larkin, and Larkin assigned the policy to him as security for the judgments. Walker paid the premiums on the policy and kept it alive until it matured, when Larkin disputed his right to the proceeds of the policy on the ground that Walker had no right to insure Larkin's life. The insurance company paid the money into court pending a decision.

(7) *Potter* v. *Spilman*, 117 Mass. 322. — Plaintiff took out a policy of insurance on his life, payable to defendant, his sister. She knew nothing about the matter, never had the policy, was not dependent on her brother, nor was she a creditor, the policy being intended purely as a gift. After some time the plaintiff asked the defendant to consent to a change in the beneficiary under the policy, which she refused to do, and he then started a suit to compel such consent.

(8) *Robinson* v. *Duvall*, 79 Ky. 83. — One Crowfoot insured his life for the benefit of his wife and children or their representatives. His wife and children having all died, he assigned the policy to his niece, Hattie Robinson. When he died, his executor, his niece, and his only grandchild, a son of one of the original beneficiaries of the policy, claimed the proceeds.

(9) *Fidelity Mutual Life Insurance Co.* v. *Beck*, 104 S. W. Rep. 533. — Beck made written application for insurance on his life, in which he warranted the truth of every statement made. To a question re-

garding the duration of an attack of rheumatism, he made no answer. The policy was issued, and Mrs. Beck brought suit after Beck's death to recover the proceeds.

LESSON LV

(1) *Loehr* v. *Royal Arcanum*, 46 N. J. Eq. 102 and 112 N. W. Rep. 441. — The plaintiff was a beneficiary in a policy issued on Loehr's life. Loehr had made a written application for insurance, warranting his answers to the questions to be true. Among other things he stated that he had once had rheumatism, whereas in fact he had had inflammatory rheumatism three times. He also stated that the beneficiary was his cousin, whereas he was a creditor, and no relation at all. Was the falsity of either of these answers a defense to an action on the policy?

(2) *Kernochan* v. *Insurance Co.*, 5 Duer. (N. Y.) 1. — Plaintiff held a mortgage on certain real property including land and buildings. He procured insurance on the buildings for the amount of the debt covered by the mortgage. The buildings were totally destroyed by fire and this action was brought to recover on the policy. It was shown that the amount of the insurance was not in excess of the face of the mortgage. It was also proven that the land without the buildings which were destroyed was ample security for the mortgage.

(3) *Ellis* v. *Insurance Co.*, 50 N. Y. 402. — Ellis

applied to an insurance agent for insurance upon a quantity of cotton. The amount of insurance and the premium were settled upon and the agent agreed to insure as requested. Ellis left it with the agent to select the companies in which he would insure, and accordingly the agent decided to place $6100 with defendant insurance company, entered it upon his books, and credited the defendant company with the amount of the premium, which was sent to defendant before the loss occurred. The policy had not yet been issued, when the cotton burned.

(4) *Paul* v. *Armenia Insurance Co.*, 91 Pa. St. 520. — Plaintiff took out insurance with the defendant company, and in the application blank which he filled out one of the questions was, "What is the distance, occupation, and material of all buildings within 150 feet?" Paul made no answer to this question and the company issued the policy without insisting upon an answer. This action was brought to recover on the policy.

(5) *Ripley* v. *Ætna Insurance Co.*, 30 N. Y. 136. — Ripley insured his buildings with the defendant company and, at the time the insurance was taken out, plaintiff was asked if there was a watchman in the buildings during the night. He answered, "There is a watchman nights." According to the custom at the mill which was insured, no watchman was on duty from twelve o'clock Saturday night until twelve o'clock Sunday night. The application in

which the above question was asked was made a part of the policy. The loss having occurred by fire, this action was brought to recover on the policy.

(6) *White* v. *Insurance Co.*, 57 Me. 91. — Plaintiff had certain personal property insured with the defendant. A building situated near the one in which the plaintiff's property was located caught fire, and it seemed certain that the latter building would be destroyed. Plaintiff caused his goods to be removed from the building to save them from apparent immediate destruction by fire, but the building in which they were did not burn. A reasonable degree of care was used in the removal of the goods. This action was brought to recover for such damage as the goods sustained and also for the expense of removal.

(7) *Babcock* v. *Montgomery Insurance Co.*, 6 Barb. (N. Y.) 637. — Plaintiff insured his property with the defendant company, and one of the conditions of the policy was that the insurer would be liable for "fire by lightning." It was proved that lightning struck the building and so shattered it as to cause a very heavy loss. No ignition occurred. This action was brought to recover on the policy.

(8) *Lyons* v. *Insurance Co.*, 14 R. I. 109. — Plaintiff's insurance policy was taken out on furniture which was described as being contained in a house on McMillen Street, Providence, R. I. Lyons moved to another house on another street and did not notify the insurer. The property having been destroyed

by fire, this action was brought to recover on the policy.

(9) *Sanders* v. *Cooper*, 115 N. Y. 279. — In this case it was shown that the insurance policy contained the usual clause providing that it would be void in case of other insurance on the property insured, not indorsed on the policy or consented to in writing by the insurer. There was such other insurance and the fact was not made known to the company. Should the plaintiff recover on the policy?

LESSON LVI

(1) *Lett* v. *Insurance Co.*, 125 N. Y. 82. — In this case the insured sold the property covered by the insurance policy and signed an instrument in which he released his interest in the policy to the purchaser. The insurance company was not notified of the transfer. A fire having occurred, the purchaser of the property sought to hold the insurance company liable on its insurance contract.

(2) *Corrigan* v. *Insurance Co.*, 122 Mass. 298. — The insurance policy in this case contained the usual clause that if the house insured should remain vacant or unoccupied for the space of ten days without written notice to, and consent of, the company, it should become void. It was shown that the tenant had moved his family into another house, in which they slept and took their meals, but he still retained

the key to, and left some of the furniture in, the house covered by the policy. Upon the house being destroyed by fire, an action was brought to recover of the company.

(3) *Bevin* v. *Life Insurance Co.*, 23 Conn. 244. — Bevin gave $300 to Barstow, and some other articles of personal property, under an agreement that Barstow should go to California and labor there for at least one year and then account to Bevin for one half of the profits of his labor. Plaintiff then insured Barstow's life with the defendant insurance company for $1000. Barstow died and this action was brought on the policy.

(4) *Connecticut Mutual Life Insurance Co.* v. *Luchs*, 108 U. S. 498. — Two persons formed a partnership with a capital of $10,000, of which each was to contribute one half. One of the partners being temporarily out of funds, the other partner contributed the entire amount under an agreement that he should be reimbursed for the $5000 advanced for his partner. Upon the failure of the partner to comply with his agreement, the one who had advanced the money took out an insurance policy for $5000 on his partner's life. This action was brought to recover on the policy.

(5) *Glanz* v. *Gloeckler*, 104 Ill. 573. — A father took out an insurance policy on his own life in favor of an infant daughter and paid all of the premiums. He retained the policy in his possession. The father having died, the daughter claims the right to recover

on the policy, and this action was brought to require the defendant, who was in possession of the policy, to surrender it to the infant daughter, who was named in it as beneficiary.

(6) *Cushman* v. *Life Insurance Co.*, 63 N. Y. 404. — The insurance policy in this case stated that the representations made by the insured in his application were made a part of the contract, and provided that if they were untrue the policy would be void. The applicant stated that he had never been afflicted with a certain disease. It was shown that he had twice been ill with this disease before the policy was issued. What effect did his statement have upon the policy?

(7) *Dwight* v. *Germania Life Insurance Co.*, 103 N. Y. 341. — One of the questions in the application for the policy involved in this case was as to whether or not the applicant was then or had been engaged in or connected with the manufacture or sale of intoxicating liquors. The applicant answered, "No." In an action to recover on the policy it was shown that the insured had kept a hotel for three and a half years before taking out the insurance covered by this policy, and that he had sold wine and liquors to his guests, although he had kept no bar.

(8) *Raddin* v. *Phœnix Life Insurance Co.*, 120 U. S. 183. — Among the questions on the application was this one, "Has any application been made to this or any other company for insurance on the life of the party? If so, with what result?" The ap-

plicant made no answer to this inquiry. The policy was issued by the company without insisting on an answer. The company now seeks to avoid payment on the policy on the ground that other applications had been made and that the failure of the applicant to so state was a concealment which would avoid the policy.

(9) *Bigelow* v. *Life Insurance Co.*, 93 U. S. 284. — The policy in this case contained a clause which provided that it should be null and void if the insured died by suicide, while either sane or insane. The company proved that the insured died from a pistol wound inflicted by his own hand and that he intended to destroy his own life. Evidence was offered tending to show that the suicide was a result of unsound mind.

LESSON LVII

CONTRACTS OF GUARANTY AND SURETYSHIP

113. Explanation.
114. How the Contract must be Made.
115. Consideration.
116. Subrogation.
117. Contribution.

113. Explanation. — There are several kinds of contracts that are properly classified as *contracts of guaranty and suretyship*. These contracts are those in which one party undertakes to be responsible for the payment of another party's debt, either absolutely, or if the other party does not pay. This lesson deals with both classes.

114. How the Contract must be Made. — The fourth section of the Statute of Frauds, which was studied in connection with contracts, contained the following: "No action shall be brought whereby to charge any defendant upon any special promise to answer for the debt, default, or miscarriage of another person unless the agreement upon which such action shall be brought or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some person thereunto

lawfully authorized." It was found necessary to make this requirement regarding this class of contracts, as it was very easy for a creditor to misinterpret a statement made by a third party regarding the payment of his debtor's obligation. A mere introduction of a party who desired credit, might, under certain circumstances, be construed as a guaranty that he would pay his obligation, although it was not the intention of the person giving the introduction to assume any liability whatever. In such cases the liability of the alleged surety was very difficult to determine, owing to the fact that much time elapsed between the time of the disputed statement and the time when the case came before the court for adjustment. To avoid this difficulty, it was required that written evidence be submitted by any person who sought to recover against one who had become responsible for the debt or obligation of another. It is not required that the contract itself be in writing, but that there be sufficient written evidence clearly to establish the fact that such a contract was entered into and what the terms of the contract were.

In this class of contracts there are three parties known as the *creditor*, the *principal debtor*, and the *secondary debtor*, who is called a *surety*, *guarantor*, or *indorser*.

A clear distinction must be made between a promise made to the principal debtor that his debt will be paid, and a promise made to the creditor that he will sustain no loss through the failure of the debtor

to pay his obligation. It is only the latter kind of contracts that we are concerned with in this lesson.

115. Consideration. — It is not necessary that there be a separate consideration for the promise of the secondary debtor, when his promise is made at the same time that the principal debtor makes his promise to the creditor. Consideration which satisfies one promise will be sufficient for the other also. If, however, the contract of the secondary party is entered into after the original contract of the principal debtor, a separate consideration will be required. This may be any benefit to the promisor or any detriment to the promisee, as in the case of all other contracts.

116. Subrogation. — By subrogation is meant the right which any surety or guarantor has upon full payment of the debt to succeed to all the creditor's rights against the principal. A surety, immediately upon the payment of the principal's obligation, has a right to any security for the debt belonging to the surety which may be in the hands of the creditor, providing he asserts his right promptly. For example, A was surety on a note made by X in favor of Y. The note was secured by ten shares of United States Steel Company's stock. Upon default in payment by X, A paid the entire amount. He is entitled to the benefit of the stock held by Y as security.

Immediately upon the payment of the debt of the principal, the surety has a right to begin an action

against the principal for the amount so paid, together with any expense that may be incurred. Such action is brought on the express promise of the principal, or on a promise of the principal to repay, implied by law from the fact that the surety has paid the principal's debt.

117. Contribution. — When one of two or more sureties or guarantors has to pay an obligation, he can immediately begin an action against his cosureties for *contribution* of their just share of the total.

LESSON LVIII

GUARANTY

118. Guarantor.
119. Kinds of Guaranties.
120. Notice of Default.

118. Guarantor. — A *guarantor* is one who agrees to become responsible for the debt or obligation of another, and whose contract is conditioned upon the failure of the principal to perform in accordance with the terms of the contract, and upon receiving notice from the creditor that such default has been made. In this respect the contract of guaranty differs from the contract of surety. The surety has unconditionally promised to pay the debt of the principal debtor, but in a contract of guaranty, the guarantor agrees to pay, if he receives notice that

the principal debtor has not done so. His obligation is a secondary one.

119. Kinds of Guaranties. — There are several kinds of guaranties that are recognized in the common law.

General Guaranty. — In this guaranty the guarantor promises to pay any debts or obligations of a designated person that may exist at the time of entering into the contract of guaranty, or that may be subsequently incurred by the party named. Such a guaranty is usually addressed "to whom it may concern," and it is not necessary for one who extends credit upon the strength of this guaranty to notify the guarantors that he has accepted the guaranty. It is sometimes provided, in the offer to become responsible for the debt of another, that such responsibility shall attach only upon receiving notice that the third party has acted upon the offer to become responsible. This form of guaranty is not desirable and is being used much less than formerly.

Special Guaranty. A special guaranty is one that is given, not to the public, but to a certain individual or firm, and provides that the guarantor will be responsible for the debt or default of a person named.

Continuing Guaranty. — This is a guaranty by a guarantor who does not limit his contract of guaranty to one transaction or one time, but agrees to be responsible for the debt of another up to a certain amount and for a definite time. By giving notice, the guarantor may bring his contract to an end.

Limited Guaranty. — A limited guaranty is one that is limited to one transaction or one time, and unless acted upon by a creditor in accordance with its terms, the guarantor is not liable.

Guaranties that are of such a nature as to indicate that the guarantor did not intend that notice should be given him of the acceptance of the guaranty, are said to be *absolute*, and no such notice of acceptance is necessary.

120. Notice of Default. — As has been stated above, contracts of guaranty require that notice of default shall be given to the guarantor, unless the guaranty was in such form as to indicate clearly that he did not expect to be notified of such default.

Guaranty of Payment. — When the guarantor guarantees the payment of an obligation, he indicates his intention to be notified, as otherwise he could not know that the payment had not been made. Immediately upon default in such cases, it is necessary for the creditor to notify the guarantor that he is expected to make payment. Failure to notify, in order to be available to the guarantor as a defense, must have caused loss to the guarantor. For example, if the principal debtor was solvent at the time the obligation became due, but did not pay the debt, and the guarantor was not notified of his failure to pay, the guarantor would be released if subsequently he was notified of the failure, and in the meantime the principal debtor had become insolvent.

Guaranty of Collection. — When a guarantor guar-

antees the collection of an obligation, he indicates that he does not expect to be notified of default of payment at the date of maturity. When such a guaranty is made, it is necessary for the creditor to proceed against the principal debtor and exhaust all legal means to recover the amount due, before he can proceed against the guarantor. The guarantor who has merely guaranteed the solvency of the debtor cannot be held liable unless the original debtor is proven insolvent.

LESSON LIX

SURETYSHIP

121. Suretyship.

121. Suretyship. — A surety is one who undertakes to become responsible for the payment of the debt of another party, and whose obligation is not conditioned upon the failure of the principal debtor to pay. The surety's obligation is an absolute one and the creditor need not even proceed against the principal debtor, but may look to the surety at once for the payment of a debt at the date of maturity. He may even neglect to take steps to collect from the principal debtor, or to notify the surety, without in any way interfering with his right to proceed against the surety at any time. In some states statute law has modified the common law in this respect, and

creditors are obliged to proceed against the principal debtor and exhaust all legal means of collection before looking to the surety for payment. This is not true generally.

A common illustration of suretyship is seen in the case of a note made in favor of C and signed by A and B. Even though there is nothing in the instrument to show that A is the principal debtor and B merely a surety, parol evidence may be introduced to show that such was the case in nearly every jurisdiction. To fix the liability of B, the surety, it is not necessary, as has been stated above, for C to attempt to collect of A. He may proceed against B at once. When one or more of the parties signing an instrument are sureties, the word "surety" should be written after the name of each, in order that their relation to the instrument may clearly appear.

There are several ways in which the surety may be released from his obligation, and in this respect he differs from a joint maker in a note like the one referred to above. If the creditor makes a binding agreement with the principal to extend for a definite time the payment of the debt, without first securing the consent of the surety, the latter will be released from further obligation on his contract. This is on the ground that the contract upon which he became liable has been modified and he is no longer responsible for its payment. When such an extension is made, it also may interfere with the right which the

surety has to protect himself by attaching property of the principal debtor. However, it is not necessary that the surety sustain a loss by reason of the extension in order to release him from his obligation. It has been held that where the surety is secured against loss by chattel mortgage or collateral security, an extension of time does not release the surety.

The surety may be released if the collateral security, which has been given to secure the payment of the debt by the principal debtor, is surrendered by the creditor without the knowledge and consent of the surety. This is necessary in order that the surety may not be deprived of his right of subrogation; that is, that he may have the right to the collateral security to reimburse him for any payment which he may have to make for the principal debtor.

The creditor may agree to release the surety and such an agreement will be binding on him. Thus, if a surety upon an obligation which has become due asks the creditor to accept payment at once if he wishes to hold him, the surety, liable, and the creditor states that he will look to the principal debtor and not to the surety, the surety is released from all further responsibility on his contract. This contract to release the surety may be made either orally or in writing.

A material alteration of an instrument upon which one has become surety, made by a party to the contract, will release the surety, as its effect is to change the obligation upon which he became liable. This

is so, even though the change would not cause the surety any loss or be any disadvantage to him. If the surety consents to the change, or agrees to become further responsible for the payment of the debt with knowledge of such change, his obligation will continue.

LESSON LX

122. Cases on Guaranty and Suretyship.

(1) *Halsted* v. *Francis*, 31 Mich. 113.—One Rice executed and delivered to Francis a valid promissory note. Halsted orally promised Rice to pay to Francis the amount of the note, in consideration of the sale and delivery by Rice to Halsted of a horse and wagon. When the note fell due, it was not paid, and Francis sued Halsted for the amount.

(2) *Moies* v. *Bird*, 11 Mass. 436.—Moies sold a piece of land to defendant's brother, and agreed to accept as part of the purchase price a note signed by defendant as surety. Defendant signed the note without receiving any consideration, the note was delivered to the plaintiff, and the land conveyed to defendant's brother. When the note fell due and was not paid, suit was brought against the defendant.

(3) *Taylor* v. *Tarr*, 84 Mo. 420.—Tarr made a promissory note and executed a deed of trust as security for the note. Taylor signed the note as surety. When the note matured, it was paid by

Taylor, and he brought suit against Tarr and the trustee.

(4) *Paulin* v. *Kaighn*, 29 N. S. L. 480.—Paulin, Kaighn, and Cooper became sureties on a bond from the Camden Ferry Company to one Champion in the sum of $30,000, all sureties being equally liable. Kaighn and Cooper held security for the benefit of the sureties amounting to $12,000. The company defaulted on the bond and it was paid by Kaighn and Cooper equally. They sold the security and partially reimbursed themselves, and Kaighn alone brought suit against Paulin.

(5) *Kennebec Bank* v. *Tuckerman*, 5 Me. 130.—On October 27, Adams gave his promissory note, with defendant as surety, to the plaintiff bank. The note was due on December 27. When it became due, Tuckerman requested the bank to collect the note from Adams. Instead, the bank orally agreed with Adams, for a good consideration, to extend the note, and continued to extend it for several years. Finally the bank brought suit against Tuckerman.

(6) *Douglass* v. *Reynolds*, 7 Pet. (U. S.) 113.—Douglass wrote a letter to Reynolds, reading as follows:

> My friend, Mr. Chester Haring, to assist him in business, may require your aid, from time to time, either by acceptance or indorsement of his paper, or advances in cash; in order to save you from harm by so doing, I do hereby bind myself to be responsible to you, at any time, for a sum not exceeding eight thousand dollars, should the said Chester Haring fail to do so.

Reynolds wrote Douglass and accepted the guaranty. Various advances and indorsements were made for Haring until he became indebted to Reynolds for $20,000, but no notice of these transactions was ever given to Douglass. When Haring failed to pay his indebtedness, notice was given to Douglass and suit commenced by Reynolds.

(7) *Ward* v. *Henry*, 5 Conn. 595.—Ward signed a note with Henry at Henry's request and Henry agreed absolutely to hold Ward harmless and to indemnify him against loss. Ward paid the note and brought suit against Henry without giving him any notice of the payment.

(8) *Day* v. *Elmore*, 4 Wis. 190.—Bassett gave his promissory note to Day, and Elmore signed a guaranty reading as follows: "I guaranty the collection of the within note for value received." The note was not paid by Bassett at maturity and Day took no proceedings to collect it for over two years thereafter. When he did proceed against Bassett, he could recover nothing, and brought suit on the guaranty.

(9) *Brookins* v. *Green*, 23 Mich. 48.—Green owned a patent and was about to organize a company to manufacture the article. He agreed orally with Brookins that, if Brookins would subscribe for shares in the company and give his note for the price, he would secure a purchaser for the shares and Brookins would not be put to any expense in the matter. Green failed to carry out his agreement and Brookins

was forced to pay the note. He then sued Green for the amount so paid and Green defended on the ground that his promise was void, being an oral promise to answer for the debt, default, or miscarriage of another.

(10) *Rogers* v. *Glenn*, 3 Md. 312.—Glenn bought a horse from Barber, who warranted its soundness, which warranty was guaranteed orally by Rogers. The price of the horse was paid by Rogers upon the written request of Glenn. Glenn refused to pay Rogers the money so advanced, on the ground that the horse was unsound, that Rogers had made himself responsible for the warranty, and that Glenn had a claim against Rogers on the warranty equal to the claim Rogers had against Glenn for money loaned. Rogers then brought suit for the money.

LESSON LXI

(1) *Paton* v. *Stewart*, 78 Ill. 481.—Bankruptcy proceedings were pending against one Gardner. A note was given to Paton by Gardner, guaranteed in writing by Stewart, upon the consideration that the bankruptcy proceedings be dismissed. The proceedings were not dismissed, but Paton brought suit against Stewart on his guaranty of the note.

(2) *Milwaukee Harvester Co.* v. *Windels*, 39 Ill. App. 521.—Windels was plaintiff's agent for the sale of its machinery, and part of his contract of agency

was that he should guarantee notes given by purchasers of machinery. Long after making his contract of agency, he guaranteed a note and was sued on his guaranty when the note was not paid by the maker. He defended on the ground that there was no consideration for his guaranty, being one made after his contract of agency.

(3) *Tatum* v. *Tatum*, 36 N. C. 113.—Herbert Tatum was guardian to certain wards and Henry Tatum was surety on his bond. Herbert conveyed certain slaves, without consideration, to Dudley Tatum while he was heavily indebted to his wards. The wards obtained judgment against Herbert on his bond, and Henry, as surety, was compelled to pay it. He then brought suit against Dudley. Has he any right of action?

(4) *Morgan* v. *Smith*, 70 N. Y. 537.—Defendant and his brother Andrew were cosureties on a lease. The lessees became indebted to plaintiff in the sum of $3000. Andrew was released from his obligation as surety, and the plaintiff brought suit against defendant alone for the full amount of the indebtedness. Can the plaintiff recover any judgment and, if so, how much?

(5) *Seaver* v. *Young*, 16 Vt. 658.—Alanson Seaver gave a bond to James Seaver, the plaintiff, to support his mother during her life and to save James harmless from any expense for her support. Young was surety on the bond. Alanson did not support his mother and James incurred expense in so doing. To

recover the money so spent he sued Young, as surety on Alanson's bond, who defended on the ground that James had not been compelled by law to expend the money and that therefore the surety on the bond was not liable.

(6) *Wood* v. *Barstow*, 27 Mass. 368.—Defendant was surety on the bond of an executor. A legatee under the will made demand on the executor for the payment of her legacy, but he said he was unable to pay it. Suit was then begun against defendant, as surety, who defended on the ground that no demand had been made on him.

(7) *Darwin* v. *Rippey*, 63 N. C. 318. One Shuford made a bond, with Rippie as surety, to pay Darwin $125. The bond produced in court read "one hundred and twenty-five dollars in specie," and it was shown that the words "in specie" had been added after the execution of the bond and without Rippie's knowledge or consent. Has Rippie any defense to the action against him as surety?

(8) *Baker* v. *Briggs*, 25 Mass. 121.—Ryan made a note to Baker on which Briggs was surety. After the making of the note, Baker told Briggs that Ryan had paid the note and that he, Briggs, was free from it. There was no consideration for this statement, and it was not true that the note was paid, but Briggs relied on it and failed to avail himself of security against Ryan as he otherwise might have done. When the note was not paid, Baker sued Briggs. Has Briggs any defense?

(9) *Port* v. *Robbins*, 35 Ia. 208.—One Benson made a note to Ashton and gave a mortgage on a stock of goods as security for the note. Robbins was surety on the note. Ashton discharged the mortgage to Benson without Robbins's knowledge or consent, and thereafter indorsed the note to Port, who brought suit thereon against Benson as principal debtor and Robbins as surety. Has Robbins any defense to the action?

(10) *Rapelye* v. *Bailey*, 3 Conn. 438. — Roger Bailey, the defendant, wrote to plaintiff as follows:

> My brother, Roswell, is wishing to go into business in New York, by retailing goods in a small way. Should you be disposed to furnish him with such goods as he may call for, from 300 to 500 dollars' worth, I will hold myself accountable for the payment, should he not pay, as you and he shall agree.

Roswell became indebted to plaintiff, but Roger heard nothing about the transactions until this suit was begun on his guaranty. Has Roger any defense?

(11) *Bank* v. *Klingensmith*, 7 Watts (Pa.), 523. — One Story made a note, on which the defendant was surety, payable to the plaintiff bank. The note was not paid and the bank took judgment against both Story and the defendant. Story being about to leave the state with his property, Klingensmith went to the cashier of the bank and asked him to issue execution on the judgment at once. The cashier refused, saying that Story was good for the note and that the bank would release Klingensmith from his liability. Story did not pay the note, and

the bank sued Klingensmith, as surety. He defended on the ground that he had been released, and the bank replied that there was no consideration for its promise.

(12) *Sibley* v. *Stull*, 15 N. J. L. 332. — Hood made his bond to Stull in the sum of $1100 for a good consideration. Stull assigned the bond to Sibley and for consideration guaranteed the payment of all sums to become due on the bond, when they became due, and for the payment thereof by the maker of the bond. Hood did not pay, and Sibley sued Stull on his guaranty without giving him any notice of non-payment, or demanding payment from Hood. Can Sibley recover judgment?

LESSON LXII

CONTRACTS OF AGENCY

123. Definition.
124. How Formed.
125. Kinds of Agents.
126. Obligations of Parties.

123. Definition. — *Agency* is a relation between two persons in which one, called the *agent*, acts for the other, called the *principal*.

Any person competent to make contracts may be a principal, and any person competent to transact the business which the principal engaged him to transact may be an agent. The principal is the sole judge as to the agent's ability to do his work.

124. How Formed. — An agency is generally created by *contract*. This contract may be made orally, except when the relation is to continue for a period longer than one year from the date of making the contract, when, according to the Statute of Frauds, it must be in writing, and where the duties to be performed by the agent include the execution of sealed instruments that are required to be recorded. Where the period of service is to continue for some

time, it is much better to enter into a written contract in which the terms may be clearly stated. Where the agent is to execute documents which by law are required to be recorded, the authority under which the agent acts must be evidenced by a written instrument called a *power of attorney*, sealed, signed, and acknowledged with the same formality required for the document which is to be executed by the agent, in order that the power of attorney may be recorded with it.

An agency may be created by *ratification*. Where an agent has exceeded his authority, or where one person acts for another without any authority, the principal, or the one for whom such person assumes to act, may ratify such action either by express words or by accepting the benefits thereof. When an unauthorized act is ratified by the principal, the effect is to give it the same validity as if the authorization had preceded the act, except where the rights of other innocent parties intervene. The ratification, to be valid, must be made with full knowledge of all the essential facts connected with the transaction, and must be of the entire transaction. If induced by fraud, mistake, or concealment, it is not valid.

An agency may be created by *estoppel*. By estoppel is meant the legal inability to deny an apparent fact because of conduct or failure to act tending to confirm the fact. An agency by estoppel is created when a party allows another to represent himself as his agent without attempting to show that no such

agency exists. For example, if A represents to C that he is B's agent, and B knowing of the representation allows C to rely on it, an agency by estoppel is created, and when C has acted in reliance upon the supposed agency B is estopped from denying that the agency existed.

An agency may be created by *necessity*. This occurs when the relation between two persons is such that one of them is given by law authority to bind the other in certain contracts. For example, a wife is the agent, by necessity, of her husband in all matters pertaining to supplies for the house, or suitable articles for herself or other members of the family. The captain of a vessel is the agent, by necessity, of the owner for the purchase of necessary materials or the making of necessary repairs to enable him to complete a voyage, when it would be difficult to communicate with the owner.

125. Kinds of Agents. — An agent who has full authority to bind his principal in all matters pertaining to the principal's business is called a *general agent*, while an agent who has authority to do only special acts is called a *special agent*. It is very important that third parties who deal with agents know whether they are special or general agents. A general agent will bind his principal so long as he acts within the scope of his *apparent* authority, even though he may act in direct opposition to the definite instructions of his principal, providing such instructions are not known to the third party. The special agent

will bind his principal only when he keeps within the scope of his *real* authority. In dealing with a special agent, one should insist upon knowing just what authority has been given him by his principal. In very important matters the agent should show a power of attorney from his principal, showing with what authority he had been clothed.

126. Obligations of Parties. — The principal is obligated to pay the agent for his service unless it is apparent that the agent performed the service gratuitously. The agent may recover for his services the contract price, when one has been agreed upon, and a reasonable amount, when no definite sum has been named.

The principal must make good to the agent any loss which may result as a consequence of any act performed within the agent's authority, if that act was lawful, and even if unlawful, if the agent did not know that it was unlawful. For example, an auctioneer who sells stolen goods, without knowing that they were stolen, may hold his principal liable for any resulting loss that he may sustain.

Immoral acts, or acts against the public welfare, cannot be authorized, and one who performs such acts for another is alone responsible.

The principal is also obligated to pay the necessary expenses incurred by the agent for the principal's benefit.

Liability of Principal. — The principal as well as the agent will be liable for fraud, negligence, or any

other tort committed by his agent while acting within the scope of his authority. The principal will also be liable for malicious acts of the agent who, at the time of committing such acts, is performing the duties intrusted to him by the principal. If the malicious acts of the agent are committed by the agent while temporarily acting outside of the scope of his authority, the principal will not be liable. The motorman, who, while running his car, maliciously injures a driver of a coal wagon, renders his principal liable for the damage, but the motorman who stops his car and leaves it to inflict an injury upon a driver of a coal wagon is alone responsible for his act. In all cases of malicious wrong the agent is liable, and in cases where the principal is liable, as stated above, the injured party may proceed against either.

It is the duty of the agent to *obey all instructions* of the principal in so far as they do not require him to perform any wrongful act. The agent must exercise *judgment and skill* wherever these attributes are required, and in undertaking to perform service for a principal, the agent impliedly warrants that he has the necessary judgment and skill. The agent must also act in *good faith* and the secrets of his principal's business must be kept to himself. He can make *no personal profit* at the expense of his principal. In all transactions within the scope of the business for which the agency was created the principal's interests must be placed above those of the agent.

LESSON LXIII

CONTRACTS OF AGENCY — Continued

127. Subagents.
128. Termination of Agency.

127. Subagents. — An agent is expected to perform personally the work intrusted to him by the principal, if the work is of such a nature that the principal can reasonably be supposed to have engaged him because of his special skill or ability. When the service to be performed is merely ministerial or routine duty, the agent may employ a subagent to act for him. In such cases the subagent is liable to the agent for his conduct, and the agent to his principal. In some cases it is apparent from the nature of the work to be performed that the principal intended the agent to employ others to assist him. In such cases the agent is not liable to the principal for the acts of his associates, as they are agents of the principal employed under the implied authority conferred upon the first agent by the principal. It is sometimes expressly agreed between the principal and agent that assistants shall be employed. In such cases the assistants become the agents of the principal.

128. Termination. — An agency may be terminated:

(*a*) *By limitation* when the time for which the

agency was formed has expired, or the work for which the agent was employed has been completed.

(*b*) *By mutual agreement* when the agent and principal enter into a contract with each other to terminate the relation before the time agreed upon has expired.

(*c*) *By revocation* of the agent's authority by the principal or by the agent's renouncing the agency. Either the principal or agent has the power to terminate the agency at any time, as the law will not compel two men to associate in this relation. If, however, either terminates the relation contrary to the contract between them, without the consent of the other, the one so terminating will be liable for damages resulting from the breach of contract. When the principal revokes the authority of the agent, he must notify third parties who are likely to deal with the agent, and should give notice to the public of such revocation. Otherwise he will be bound by any acts of the agent which would have been within the scope of his authority had the agency continued.

(*d*) *By death, insanity, or bankruptcy* of either the principal or agent. The acts of the agent are the acts of the principal, and at the death of the principal he ceases to have capacity to contract. When the principal has been declared insane and has no further power to contract, his agent cannot bind him by any act. In the case of bankruptcy of either principal or agent, it becomes necessary to turn the property

of the bankrupt over to his trustee, and therefore no contracts with reference to this property can be made by the principal or agent.

(*e*) *By declaration of war* between the countries of the principal and agent where they are citizens of different countries. This becomes necessary because of the law that contracts may not be made between citizens of two countries that are at war with each other.

There is one kind of agency in which the principal cannot revoke the agent's authority. This is an *agency coupled with an interest.* In such an agency the agent has an interest in the subject matter of the agency. For example, A owes B fifty dollars. A gives his horse to B with instructions to sell him for one hundred dollars and to keep his commission and the fifty dollars which A owes B, returning the balance. Such an agency is not revoked by the death, insanity, or bankruptcy of the principal, nor can it be revoked by the principal without the agent's consent.

LESSON LXIV

129. Cases on Agency.

(1) *Rahn* v. *The Singer Manufacturing Co.*, 132 U. S. 518.—Corbett was employed by the Singer Manufacturing Co. to sell sewing machines on "Canvasser's Salary and Commission Contract."

It was agreed between Corbett and the company that he should devote his entire time to the sale of sewing machines; the company was to furnish him with a wagon; the horse and harness were to be furnished by Corbett and were to be used exclusively in canvassing for the sale of Singer machines. While driving carelessly, Corbett ran into Rahn, inflicting serious injury. This action was brought by Rahn against the Singer Manufacturing Co. to recover damages.

(2) *Rice* v. *Wood*, 113 Mass. 133.—Rice was employed by a third party, on commission, to dispose of certain real estate and later, without the knowledge of that third person, he entered into a contract with Wood under which he was to exchange certain stocks for real estate and was promised a commission for his services. Wood knew that Rice was employed by the owner of the real estate to sell it, and with knowledge of this fact, he was introduced by Rice to the owner of the real estate and the exchange was effected. This action was brought by Rice to secure the commission which Wood had promised to give him.

(3) *McArthur* v. *Times Printing Co.*, 48 Minn. 319.—In September, 1889, C. A. Nimrocks and others were engaged in organizing the Times Printing Co. to publish a newspaper. During that month, Nimrocks made a contract with McArthur in behalf of the contemplated company in which it was agreed that McArthur should act as advertising solicitor for a period of one year from October 1st. The corporation was not fully organized until October 16th, but

the publication of the paper was begun October 1st, at which date McArthur entered upon the duties of advertising solicitor in accordance with his agreement. He continued in this position until the following April, when he was discharged. All of the officers, stockholders, and directors of the company knew of the contract between Nimrocks and McArthur at the time the company was organized. No objection was ever made to it. This action was brought by McArthur to recover damages for breach of contract.

(4) *Exchange National Bank* v. *Third National Bank*, 112 U. S. 276.—The Exchange National Bank of Pittsburgh had in its possession certain drafts drawn on Walter M. Conger, Sec., Newark Tea Tray Co., Newark, N. J. These drafts were sent to the Third National Bank of New York for collection. The Third National Bank of New York sent them to a bank in Newark. It was understood by all of the banks that the drafts were drawn on the Tea Tray Company and not on Walter M. Conger personally. The Newark bank took Conger's individual acceptance but gave no notice of this fact until the drawers and indorsers of the drafts had become insolvent. This action was brought to hold the Third National Bank of New York responsible for the negligence of the Newark bank to which the drafts were sent for collection.

(5) *Blackstone* v. *Buttermore*, 53 Penn. St. 266.—Buttermore was the owner of certain land, and he gave Davidson a power of attorney. He further

stated in the same instrument that "this authority is irrevocable before the first day of May next." On the 19th of April, Davidson entered into an agreement for the sale of the land to Blackstone. Buttermore refused to carry out the sale, as he had previously revoked the power of attorney given to Davidson, and Blackstone had received notice of this revocation. This action was brought to enforce the contract.

(6) *Claflin* v. *Lenheim*, 66 N. Y. 301.—Lenheim was the owner of a store in Meadville, Pa. For several years prior to July, 1867, Claflin had sold goods to Lenheim through his brother, H. S. Lenheim, who had charge of the store at Meadville. In August, 1867, a bill of goods amounting to $8000 was purchased for the Meadville store and there was some dispute between Claflin and Lenheim regarding it. The difference between the parties was settled in a court of law. About this time, the store at Meadville was destroyed by fire. Lenheim conducted a second store at Great Bend, Pa. After the trouble referred to between Claflin and Lenheim in 1867, no further purchases were made for either the Great Bend store or the Meadville store until October, 1869, when Lenheim ordered goods of Claflin for the Great Bend store. A month or two later, H. S. Lenheim purchased goods in the name of his brother for the Meadville store. Lenheim, the defendant, claimed that his brother was not authorized to make the purchase and refused to pay for the goods on the ground that his brother had no author-

ity to purchase the goods in his name. Evidence was given tending to prove that no formal notice had been given by defendant Lenheim to Claflin that his brother was no longer his representative.

(7) *Mc Kindly* v. *Dunham*, 55 Wis. 515. — In August, 1879, W. L. Kilbourn called upon Dunham and exhibited business cards of McKindly's company in Chicago. He obtained an order from Dunham for 1000 cigars of a certain brand made by McKindly. The order was sent to McKindly who shipped the goods to Dunham with the bill of $30 payable in 60 days. About 30 days afterward, Kilbourn called upon Dunham and asked him for payment of the bill. Dunham paid the bill and took a receipt from Kilbourn. This money never reached McKindly. This action was brought to recover the amount from Dunham. The evidence showed that Kilbourn was to solicit orders from country merchants, and if such orders as he might secure were accepted and filled by McKindly, he, Kilbourn, should receive a commission on them.

(8) *Liebscher* v. *Kraus*, 74 Wis. 387. — This action was brought against Kraus as a joint maker of the following note:

$637.40. MILWAUKEE, January 1, 1887.

Ninety days after date, we promise to pay to Leo Liebscher, or order, the sum of six hundred and thirty-seven dollars and forty cents, value received.

San Pedro Mining and Milling Company,
F. KRAUS, *President.*

(9) *Davis* v. *Hamlin*, 108 Ill. 39. — Davis was the confidential agent of Hamlin, who was the lessee of a theater. Just before the expiration of Hamlin's lease, Davis secretly leased the premises from the owner for a new term, taking the lease in his own name. Hamlin brought an action against Davis to compel him to turn over the lease to him on the ground that it was procured while he was acting as his confidential secretary and presumably for his benefit.

(10) *Whitney* v. *Merchants' Union Express Co.*, 104 Mass. 152. — A certain draft drawn upon Plumber & Co. was given by Whitney to the express company with definite instructions to present it to Plumber & Co., and if they refused to honor it, to return it immediately. The express company presented it to Plumber & Co., but some question was raised regarding the amount and they withheld it until they could write to Whitney and ascertain the correct amount. After some correspondence regarding the matter, the amount was determined to the satisfaction of Plumber & Co. and they were ready to pay it on the morning of the 16th, but the express company did not present it, and on the 19th Plumber & Co. became bankrupt. This action was brought to recover the amount from the express company.

LESSON LXV

(1) *Eberts* v. *Selover*, 44 Mich. 519. — A subscription agent canvassing for a history to cost $10 had a book for signatures, and on this book it was printed that no terms except those printed thereon should be binding. A justice of the peace consented to sign, on condition that his office fees from that time to the time of delivery of the book should be taken in payment. This was agreed to, and he was given a written memorandum by the agent to that effect. What are the rights of the publisher and the purchaser?

(2) *McCready* v. *Thorn*, 51 N. Y. 454. — An action was brought against the owners to recover for services and advances rendered to the master of a ship. The master was running the vessel under an arrangement with the owners whereby the master was to furnish everything and divide the profits, but the plaintiff had no notice of this. Were the owners of the vessel liable for the money and labor advanced to the master?

(3) *Wallace* v. *Floyd*, 29 Pa. St. 184. — Here the plaintiff agreed to work for a given time at a certain salary. He stayed beyond the time, and nothing was said about the salary for the additional period. Could he recover salary for the period which he worked beyond the time stated in the original contract, and if so, at what rate?

(4) *Moore* v. *Appleton*, 26 Ala. 633. — Plaintiff

brought an action to be reimbursed for damages which he had been obliged to pay, because of certain acts performed by him as agent for the defendant in dispossessing a third party of lands claimed by the defendant, and which plaintiff had reason to believe belonged to defendant. Is the plaintiff entitled to recover, and if so, on what ground?

(5) *Walker* v. *Osgood*, 98 Mass. 348. — This was an action by a real estate agent for commissions. Defendant had employed plaintiff to sell or trade his farm and the agent effected an exchange and made an agreement with the third party that he was to receive from him a commission. Should the plaintiff be allowed to recover his commissions from the defendant? What would be his rights against the third party?

(6) *Bunker* v. *Miles*, 30 Me. 431. — Defendant was employed by plaintiff to buy a certain horse for him for $80 or as much less as he could, and was to have $1 for his trouble. Defendant bought the horse for $72.50 and returned no part of the $80 to plaintiff. This action was brought to recover the difference between the purchase price plus $1 which was agreed to be paid for the services and the $80 advanced to the defendant.

(7) *Kerfoot* v. *Hyman*, 52 Ill. 512. — Here plaintiff owned certain land and employed defendant to sell it for a certain amount. The defendant bought it himself and took the title in the name of a third party, but for his own benefit without the owner's

knowledge, and at the same time had a part of it sold for as much as he obtained for the whole of it for the plaintiff. This action was brought by the plaintiff to recover the profit on the property sold, and to have the balance of the unsold property returned to him.

(8) *Allen* v. *Merchants Bank*, 22 Wend. (N. Y.) 215. — This is a case where a draft was drawn by plaintiff in New York on a Philadelphia merchant and deposited by plaintiff in the Merchants Bank of New York. Defendant bank sent the draft to the Philadelphia bank. It was presented by the Philadelphia bank notary, but he did not properly protest it, and because of the lack of the proper protest plaintiff was damaged. This action was brought by the depositor against the bank in which the deposit was made.

(9) *Dempsey* v. *Chambers*, 154 Mass. 330. — This was an action for damages in breaking a plate-glass window. It was proved that the party who delivered coal for the defendants, and in so doing broke the window, was not authorized to deliver coal for them, and they did not know of his doing it. Later, after they knew of the broken window, they presented a bill for the coal.

(10) *Moore* v. *Stone*, 40 Iowa, 259. — An agent was employed by plaintiff to negotiate for the purchase of certain land. He obtained the contract for the conveyance, the first payment was made, and the agent was paid for his services. After the agent

was paid for his services, he bought in the property at tax sale, and the plaintiff in this case brings this action to set aside the sale on the ground that the defendant was still his agent, and therefore could not purchase the property in his own name.

(11) *Knapp* v. *Alvord*, 10 Paige Ch. (N. Y.) 205. — A cabinetmaker, on going abroad, employed an agent to carry on his business, and gave him the full and entire control of his property, with a written power to sell any or all of the furniture or stock, and apply the proceeds to the security or payment of a certain note indorsed by said agent and a third party, or for any renewals upon which the agent might become liable. The cabinetmaker subsequently died before his property had been entirely disposed of by the defendant. The plaintiff contends that, at the death of the cabinetmaker, the agency with the defendant ceased.

LESSON LXVI

CONTRACTS OF PARTNERSHIP

130. Definition.
131. How Formed.
132. Kinds of Partners.

130. Definition. — A *partnership* is the relation between two or more persons in which they have united their capital, labor, skill, or experience in the prosecution of a business, as principals, for their mutual profit. Persons may be associated in business under a contract to share losses and gains without forming a partnership, but when it is agreed or understood that each, as principal, shall have an equal voice in the management of the business, a partnership relation is created. Thus it will be seen that the idea of principalship is important.

131. How Formed. — A partnership may be formed by:

(*a*) Oral contract.
(*b*) Written contract.
(*c*) Implication.

A partnership which is to be terminated within one year may be formed by oral contract. If it is to continue for a longer period, the Statute of Frauds

requires written evidence. It is preferable, however, to enter into a written contract in which all of the important terms of the agreement are set forth. This will avoid possible misunderstanding and enable the partners to know at any time just what their rights are as against each other. No particular form of writing is necessary. The written agreement is called *Articles of Copartnership* and should contain the following facts and any others that may seem desirable:

(*a*) Name of the firm.
(*b*) Nature of the business.
(*c*) Location of the business.
(*d*) Names of the partners.
(*e*) Investment of each partner.
(*f*) Duties of the partners.
(*g*) Division of profits.
(*h*) Division of assets on dissolution.

It sometimes happens that two or more parties enter upon a business venture without going through the formality of entering into a partnership agreement. It is simply understood between them that they will undertake the venture jointly, share the profits or bear the losses equally, and each is to have a voice in the management of the business. In such a case a partnership is formed by an implied contract, and the partners are subject to all the laws applicable to partnerships created by means of express contracts.

When two or more parties, without any intention to assume the responsibilities of partners, act as if they were partners and by their acts cause third persons to believe they are partners, they will be considered partners as to such third persons dealing with them. This is called a *partnership by estoppel.* By estoppel is meant the legal inability to deny an apparent fact because of conduct, or failure to act, tending to confirm the fact. Among themselves the parties have no rights as partners, but as to third persons dealing with them believing them to be partners, they are liable as such.

132. Kinds of Partners. — There are six kinds of partners according to the most convenient classification:

Ostensible or Public.
Secret.
Silent.
Nominal.
Dormant.
Limited or Special.

An *ostensible* or *public partner* is one who is in reality a partner in the business, is known as such, and who has full liability as such.

A *secret partner* is one who is in reality a partner, but who is not known to the public as such. He has a voice in the affairs of the partnership, and is in every way like the public partner, except that his relation to the business is not known to the public.

A *silent partner* is one who is in reality a partner, and who is known to the public as such, but who has no active part in the management of the partnership business.

A *nominal partner* is one who is not in reality a partner, but who has allowed the firm to use his name in such a way as to indicate to third parties that he is financially interested in the business. His liability to third parties dealing with the firm is the same as that of a public partner.

A *dormant partner* is one who is both secret and silent. He is not known to the public and has no voice in the partnership affairs, but shares in the profits.

A *special* or *limited partner* is one who invests a certain amount in the business and his liability to third parties is limited to this amount. Certain formalities must be complied with, such as giving notice to the public that a limited partner is connected with the firm, by means of public advertisements, filing in a public office, etc. The word " limited " after the partnership name is required in some jurisdictions. In some states no limited partnerships may be formed.

LESSON LXVII

CONTRACTS OF PARTNERSHIP — CONTINUED

133. LIABILITY OF PARTNERS.
134. POWER OF MAJORITY.
135. COMPENSATION.
136. CHOICE OF ASSOCIATES.
137. DISSOLUTION.

133. Liability of Partners. — Each partner, except a special partner, is individually liable for the debts of the firm. The partners have a joint liability, but if an action is brought against all of them and judgment secured, the judgment can be satisfied out of the property of any one of the partners. In case the partnership becomes bankrupt, the partnership creditors must first make claim on the assets of the firm and then they may look to the individual property of the partners, if any is left after individual creditors are paid. Thus it will be seen that individual creditors have first claim on individual property of the partners. Firm creditors have first claim on firm property. It is held in many states that, where there are no firm assets, firm creditors may share equally with individual creditors in the property of the individual partners.

The liability of a secret partner is the same as that of any other partner if his identity becomes known.

When the partnership is dissolved, a notice of dissolution must be sent to all the creditors of the firm, and a notice must also be published for the benefit of the public. If such notices are given, the retiring partner will not be liable for any debts entered into after his retirement, but he will continue to be liable to third parties for debts contracted while he was a member of the firm, even though he has entered into a contract with his partners whereby they assume full liability.

134. Power of Majority. — In all matters pertaining to the regular conduct of the firm's business, the will of the majority of the partners will prevail, but on certain matters such as changing the location or the nature of the business, the consent of all partners must be secured.

135. Compensation. — No partner can demand compensation for his services unless it is so stated in the contract by which the partnership is formed. In the absence of any agreement to the contrary, each partner is expected to give his time to the conduct of the partnership affairs. If one partner is absent for a long period of time on account of illness, the other partner can demand no compensation for extra services. He may employ some one to assist him with the work and charge the expense to the firm.

136. Choice of Associates. — Persons have the right to choose, not only those with whom they are

willing to form a partnership, but also those who may subsequently come into the partnership. The heirs of a deceased partner cannot come into a partnership relation with the survivors without their consent. The purchaser of a partner's interest has only the right to receive the share which belonged to the retiring partner upon the settlement of the partnership affairs.

137. Dissolution. — There are seven important causes of dissolution of a partnership. A partnership is dissolved:

(*a*) *By limitation*, when the time for which it was organized has elapsed, or the purpose for which the partnership was formed has been accomplished.

(*b*) *By sale of a partner's interest.* When this occurs, the person who buys the retiring partner's interest has no right to come into a partnership as a partner, but can demand a settlement of the partnership affairs and the payment to him of the share that belongs to the retiring partner whose interest he has purchased.

(*c*) *By death of a partner.* The dissolution takes place the instant any one of the partners dies. Immediately upon the death of a partner, his legal representative or heir is entitled to his interest in the partnership, and, therefore, a settlement of the partnership affairs must be had.

(*d*) *By bankruptcy*, either of the partnership or of an individual member of the partnership. When one of the partners becomes bankrupt, his trustee

in bankruptcy has a right to his share of the partnership for the benefit of the bankrupt's creditors and, therefore, the partnership must be dissolved.

(*e*) *By insanity* of any partner, because his committee or guardian will be entitled to his share of the partnership property and the insane partner is no longer able to participate in the partnership affairs.

(*f*) *By decree of court*, when in the judgment of the court it seems necessary or desirable that the partnership be dissolved.

Upon dissolution there must be a strict accounting between the partners in accordance with the articles of agreement, or in the absence of any written agreement, in accordance with law. All debts must first be paid and whatever surplus remains must be divided among the partners.

Notice of Dissolution. — Notice of dissolution must be sent to all creditors of the partnership and to any who have given credit to the partnership. A notice must also be published in a newspaper for the benefit of those who have had no dealings with the partnership, but who might be induced to extend credit upon the strength of the partnership relation. It is generally held that notice of dissolution must actually be communicated to those who are or have been upon the books of the partnership as creditors. A retiring partner who fails to give proper notice of his retirement will continue to be liable as a partner to those who give credit to the partnership without knowledge of the fact that he has withdrawn.

LESSON LXVIII

138. Cases on Partnership.

(1) *Bagley* v. *Smith*, 10 N. Y. 489. — Bagley, Smith, and one other formed a copartnership under articles of copartnership in which it was stated that the partnership was to continue for a term of four years and one month. Before the expiration of two years, while Bagley was away, Smith and the other partner published a notice of dissolution, and immediately formed a new partnership excluding Bagley, who brings an action for damages which he has sustained as a result of the dissolution.

(2) *Harris* v. *Peabody*, 73 Me. 262. — Royal Williams and James A. Norton were copartners under the name of Williams-Norton. Upon their own request they were individually and as copartners duly adjudged insolvent debtors. The assets of the partnership amounted to $1.19 and were absorbed by the expenses of selling them. Norton's individual estate had no assets while Williams's had individual property to the extent of $1177.36. There were claims against the partnership amounting to more than $2200; against Williams's individual estate $1133.67; and against Norton's individual estate there were no claims. The partnership creditors claim that they should share Williams's individual estate with his individual creditors *pro rata*. This action was brought to enforce this alleged right.

(3) *Griffith* v. *Buffum*, 22 Vt. 181. — Buffum and Ainsworth made an agreement under which they were to work together in the business of manufacturing marble. Buffum was to furnish the marble and Ainsworth was to pay him one half of the cost of it. Buffum was to board Ainsworth, and both were to contribute their labor and skill in the business, and the profits of the business were to be equally divided between them. This action was brought by Griffith to require Buffum to pay for marble purchased for use under the terms of the above agreement. The question as to whether Buffum and Ainsworth were in reality partners was submitted to the court.

(4) *Hess* v. *Lowrey*, 122 Ind. 225. — Luther W. Hess and Frank C. Hess were partners in the practice of medicine and surgery. Luther W. Hess set a dislocated shoulder for Lowrey and the work was so poorly done that it caused Lowrey much trouble and expense. This action was brought against both Luther W. Hess and Frank C. Hess as partners. The question of the liability of Frank C. Hess is submitted to the court, Luther W. Hess having died during the time this action was pending.

(5) *Murphy* v. *Crafts*, 13 La. Ann. 519. — Murphy and Crafts were partners transacting business in the city of New Orleans. One of the statements contained in their articles of copartnership was the following: "We will not indorse any note, draft, or give our signatures separately or collectively except for our legitimate business purposes." In violation

of this article, Crafts accepted in the partnership name bills of exchange to the amount of $12,566 for the benefit and accommodation of his brother-in-law, John C. Robertson. Robertson failed in business and the firm of Murphy and Crafts were required to pay the acceptances made by Crafts as stated above. Murphy brings this action against Crafts for the amount which he was required to pay as a result of the acceptances referred to above.

(6) *Harvey* v. *Childs et al.*, 28 Ohio St. 319.—Potter went to Childs and told him that he had contracted for about two carloads of hogs, to be delivered at Loudonville the next day, but had not the money to pay for them. He asked Childs to advance the money and take an interest in the hogs. Childs refused. Thereupon Potter proposed that if he would let him have the money to enable him to pay for the hogs he had bought, and others he might have to buy to make the two carloads, he, Childs, should take possession of the hogs when carred at Loudonville, as security for the money, take them to Pittsburgh, sell them, and take his pay from the proceeds of the sale; that he might have one half the net profits of the venture, and that in no event should Childs sustain any loss, but the money advanced by him should be fully paid by Potter in case the amount realized from the sale of the hogs was insufficient. Childs accepted the proposition, and it being agreed that $2500 would be enough to pay for the two carloads, he advanced that sum to Potter. Afterward,

without the knowledge of Childs, Potter bought the hogs in question of Harvey, on his own credit, and they made part of the two carloads of hogs which were taken possession of by Childs, sold in Pittsburgh, and the avails of the sale appropriated in payment of the money advanced by him. No profits were made. The avails of the sale were insufficient to pay the amount advanced by Childs, and Potter paid him the deficiency, and for his time and expense in the transaction.

The question to be considered, then, is, are the defendants by construction of law to be regarded partners as to the plaintiff being a third person in the debt incurred to him by Potter in his own name?

(7) *Chester* v. *Dickerson*, 54 N. Y. 1.—Chester bought lands of a real estate firm including Dickerson, Reed, Jones, and DeWitt. Certain members of the firm including Reed, but not including Dickerson, had arranged to have a quantity of oil scattered over the surface of the ground that was to be sold to Chester, who desired oil land. As a result of this fraud, thinking the property offered him was oil-bearing land, Chester purchased it. Afterward the fraud was discovered and Chester brings an action against Dickerson as one of the partners for the damage which he sustained.

(8) *Johnsion* v. *Dutton*, 27 Ala. 245.—Johnston & Co. was composed of Johnston, Fogg, and Vanderslice. Several notes were given in the firm name by Fogg. Johnston, who was sued on these notes as a

partner, denied liability on the ground that he had, before the notes were drawn, given personal notice to Dutton and had also published a notice in the newspaper to the effect that he, Johnston, would not be bound by any future contracts made by Fogg without Johnston's consent. He did not withdraw from the partnership, but merely informed the public and creditors that he would not be responsible for Fogg's actions unless he consented. This action was brought and the question of Johnston's right to renounce liability for Fogg's acts was the question involved in this case.

(9) *Lindsey* v. *Stranahan*, 129 Pa. St. 635.—Stranahan had carried on business alone prior to 1876, when he sold a half interest in his business to J. K. Lindsey. After the new firm was formed, entire management and control of the business was left to Lindsey. When settlement by Stranahan and Lindsey was made, Lindsey claimed compensation for managing the business. No express agreement was made regarding this matter.

LESSON LXIX

(1) *Morris* v. *Peckham*, 51 Conn. 128.—Plaintiff agreed orally to assign to defendant a one-half interest in an invention for making patent screw drivers, defendant agreeing to furnish capital to procure the patents and to purchase the machinery and

stock, and they were then to engage in manufacturing the screw drivers. After conducting the business one year, defendant refused to continue and to furnish more funds. Plaintiff brought an action to compel specific performance of the partnership agreement, claiming that the partnership was to continue for seventeen years, the life of the patent. No evidence was introduced tending to show that the partnership was not to continue during the life of the patent which was seventeen years.

(2) *Milmo National Bank* v. *Bergstrom*, 1 Tex. Civ. App. 151.—Defendant and one Carter were engaged as partners for one year in dealing in hides, wool, and produce, under the name of A. N. Carter. At the time Carter opened a credit account with plaintiff, he informed plaintiff that defendant was his partner. The money sued for had been loaned after defendant had withdrawn from the firm, but this was not known to plaintiff. Should defendant be held liable for the money so loaned, and if so, on what ground?

(3) *Hicks* v. *Cram*, 17 Vt. 449.—Defendants were sued as partners doing business under the name of Cram & Hutchinson. Defendant Hutchinson claimed that he was not a partner and had no interest in the business, but that his son was the partner. It was shown that defendant had held himself out as a partner, and when Cram had stated that Hutchinson was a partner, he had made no denial.

(4) *Moore* v. *Powell*, 79 Ga. 524.—This was an action brought against Marbut and Powell, doing

business under the firm name of S. P. Marbut. Powell denied being a partner. He contributed the use of a dwelling, storehouse, and $200, which he called a loan, and Marbut contributed his time to the business and $200. No agreement was made as to the rent of the house or the interest on the money, but Powell was to receive one half of the profits of the business as profits and not as compensation for the use of the house and money.

(5) *Bush* v. *Beecher*, 45 Mich. 188. — Beecher owned a hotel and Williams agreed, in writing, to hire the use of it from day to day, to keep it open as a hotel, and to pay Beecher daily a sum equal to one third of the gross receipts. Plaintiff sold Williams a bill of goods and then sought to hold Beecher as a partner. The goods were sold to Williams, and Beecher was never held out as being in partnership with him.

(6) *Drake* v. *Thyng*, 37 Ark. 228. — Drake and Thyng were partners in the brickmaking business. While Drake was away, Thyng sold the stock and plant to a third party for an insignificant and inadequate sum. Drake brought this action to set aside the sale.

(7) *Merry* v. *Hoopes*, 111 N. Y. 415. — Hoopes and Merry were copartners engaged in manufacturing galvanized iron under two trade marks, one of the "Lion brand," and the other the "Phoenix brand." Upon the dissolution of the firm, defendant bought the business. Thereafter, plaintiff brought this

action to restrain him from the use of the above-named trade marks, nothing having been said about them in the bill of sale.

(8) *Hodge* v. *Twitchell*, 33 Minn. 389. — Hodge, Twitchell, and Ruby agreed to purchase real property together, each to pay one third of the cost and to divide the property equally. Twitchell called their attention to a lot and advised its purchase. While they were considering it, he secretly made an agreement with the owner that if he, Twitchell, found a purchaser for the remainder of the lot at $2500, the original price, the seller would give him a certain part of the lot for his services. Twitchell then told his partners that a part was sold, but the balance could be obtained for $2500, and urged its purchase. It was taken upon his recommendation, and the portion promised Twitchell was conveyed to his wife, in pursuance of the owner's agreement. This action was brought to recover the property so conveyed to Twitchell's wife.

(9) *Staples* v. *Sprague*, 75 Me. 458. — Five persons had agreed to cut and pack a quantity of ice for sale, and after deducting all expenses to divide the proceeds equally. One of the members, with the consent and approval of two others, sold a large quantity of the ice. The remaining two brought suit to charge the others for damages in selling the ice at what they claimed to be too low a price.

LESSON LXX

CORPORATIONS

139. Definition.
140. How Created.
141. Kinds.
142. Powers.

139. Definition. — A *corporation* has been defined as an artificial person. It is a collection of individuals who are associated together in such a way as to permit them to perform acts the same as an individual could if acting alone, so long as these acts are within the powers conferred by the charter under which the corporation is organized.

Modern business requirements have become so complex and commercial enterprises so large that it has become necessary to adopt a form of business organization that will be permanent, will permit of centralization of management, and will enable men to raise large amounts of capital for the prosecution of business.

140. How Created. — Corporations are generally formed under a general law which provides that a designated state official shall have the power to receive articles of incorporation, and to grant charters,

but some corporations are chartered by a special act of a legislative body.

The charter sets forth the express powers which are conferred upon the corporation, and is in reality a contract between the corporation and the state. It is quite customary for the state to reserve in charters the right to revoke them at any time.

Articles of Incorporation are prepared, setting forth the object of the corporation, names and addresses of the incorporators, the proposed place of business and name of the company, and any other important facts, and these articles of incorporation are filed with an official designated by law to receive them.

The law of each state requires that a specified part of the capital stock shall be subscribed, a stated part of the total subscription shall be paid in, and a certain number of directors shall be residents of the state.

141. Kinds of Corporations. — An *ecclesiastical* corporation is one which is organized for religious purposes.

A *lay* corporation is one that is organized for secular purposes.

An *eleemosynary* corporation is one that is organized for purposes of charity or philanthropy.

A *public* corporation is one that is organized for governmental purposes. An incorporated city is a good illustration of this kind.

A *private* corporation is one that is organized by

individuals, wholly or in part, for carrying on business for private gain.

142. Powers. — Among the usual powers that are conferred upon a corporation expressly by its charter, or by implication, are the following:

The right of *perpetual succession.* The corporation may continue for a specified number of years or indefinitely according to the charter. The death of a stockholder or any of the other changes in the condition of the stockholders, which would dissolve a partnership, will have no effect upon a corporation.

The right to *sue and be sued* in the corporate name is one of the powers granted to corporations. In a partnership, suits must be brought against the partnership, or by the partnership, in the names of the individual members of the firm.

A corporation may *purchase, hold, and sell real estate* in its corporate name, if this should be necessary or desirable in connection with the business which the corporation was chartered to carry on.

A corporation has the right to *adopt and use a corporate seal.*

It is also provided that the corporation may have the right to *make such by-laws* as may become necessary in the prosecution of its business, and which are not at variance with the charter.

In addition, such *implied powers* as may be necessary to give full effect to the powers enumerated above, and any others that may be provided for in the charter, are possessed by the corporation.

The usual powers and rights of banks and insurance companies cannot be implied from any statements in a charter. Such powers must be specifically conferred.

A corporation cannot enter into a partnership with other corporations, or with individuals, as the liabilities of partners are different from, and inconsistent with, the liabilities of stockholders.

LESSON LXXI

CORPORATIONS — Continued

143. Capital Stock.
144. Kinds of Stock.
145. Voting.
146. Management.
147. Dividends.

143. Capital Stock. — The capital stock is the amount of capital that is authorized by the charter, and is the maximum amount which may be sold without formally applying for an increase. A company may be organized with a capital stock very much larger than the amount of capital actually desired in the business. For example, a company may be authorized to begin business with a capital stock of $100,000, and may sell shares of stock to the extent of $50,000, keeping the balance to be disposed of later, as occasion may require.

In the articles of incorporation, it is stipulated that the capital stock shall be divided into a certain number of shares, having a stated par value. The usual par value of the stock of business corporations is one hundred dollars. The shares of stock are represented by certificates and when a stockholder desires to sell his interest in the business, he effects the sale by delivering his certificate of stock to the purchaser, together with a power of attorney which is printed on the back of the certificate, authorizing some officer of the company to transfer the stock from his name to that of the purchaser on the books of the corporation. A new certificate will then be issued to the purchaser. No transfer is complete until the records on the corporation's books are changed. When dividends are to be paid, a date is set as the latest date when transfers on the books can be made, and all who stand on the books as stockholders on that date are entitled to dividends.

144. Kinds of Stock. — *Common stock* is the stock upon which dividends are paid after the preferred stockholders have received their share of the profits, if any profits remain.

Preferred stock is the stock upon which a specified rate per cent of dividend is payable each year, providing the profits of the business are sufficient to pay it.

In some cases, *cumulative preferred stock* is issued which provides that a certain dividend shall be paid each year, and in the event of failure to pay this

dividend in any year, the amount not paid will become a first claim against the profits of each succeeding year until all the dividends on this class of stock have been paid.

When all the capital stock has been issued and more working capital is needed, it may be desirable for the stockholders to return part of their stock to the treasury to be sold for cash required for immediate use. *Treasury stock* is the name usually applied to any part of the capital stock which is so returned by the stockholders to be sold for the purpose of raising additional working capital.

145. Voting. — Each stockholder has one vote for each share of stock which he owns, and a majority vote of the stockholders is necessary for the election of officers.

In some companies cumulative voting is provided for. Under this plan a stockholder may cast one vote on each question for each share of stock which he holds. If he prefers not to vote on any proposition, he saves his vote for some other question, thus doubling his vote on that question. In this way minority stockholders may unite on an important proposition and outvote the majority.

One entitled to vote at a meeting of stockholders may give his right to vote to another person who will vote in his place. This is called *voting by proxy*.

146. The Management of the corporation is usually vested in a Board of Directors, who are

elected by the stockholders from their number, to serve for one year without pay. While the services which these directors render are gratuitous, it has been held that they are liable for any misconduct, negligence, or fraud, in the handling of the corporation affairs. The directors elect the officers of the corporation, which are usually president, vice president, treasurer, and secretary. These officers carry out the instructions of the Board of Directors, to whom they are directly responsible. In some corporations, one of the directors is chosen to act as the executive head of the business, and is known as the managing director.

147. Dividends. — The profits of the corporation are distributed to the stockholders in the form of dividends, when so voted by the Board of Directors. Each common stockholder receives a *pro rata* share, if all the stock is common, and in case there is preferred stock, a *pro rata* share of what remains after the preferred stockholders have been paid the amount which the company has agreed to pay them.

A stockholder, who believes that dividends are being wrongfully withheld, may institute proceedings against the Board of Directors in a court of law, and determine if in justice to the stockholders a dividend should be declared.

Dividends can be paid out of profits only. A corporation has no right to declare dividends to be paid out of capital, as this would mislead the public

in the belief that the business is more prosperous than it is.

It sometimes happens that *stock dividends* are declared by the Board of Directors. In this case, each stockholder receives a *pro rata* share of the unsold stock, or a portion of it, which remains in the treasury, in lieu of a cash dividend.

LESSON LXXII

CORPORATIONS — Continued

148. Ultra Vires Acts.
149. Liabilities of Stockholders.
150. Dissolution.

148. Ultra Vires Acts. — A corporation must keep strictly within the powers conferred upon it in its charter. When it makes contracts about matters outside of the scope of the business for which the corporation was created, these contracts are said to be *ultra vires* and are void.

If money has been paid to the corporation by a party not a member of the corporation, such party can bring an action against the corporation to recover the amount so paid, but he cannot enforce the contract. A corporation cannot derive an advantage from the fact that an act was *ultra vires*.

If *ultra vires* acts of a serious nature are committed by a corporation, this may be a sufficient ground upon

which to bring an action in a court of equity, asking for the revocation of the charter.

149. Liabilities of Stockholders. — Unlike the members of a partnership, the stockholder is liable only to the extent of his subscription to the capital stock. His private property cannot be attached to satisfy the debts of the corporation, except to the extent of any unpaid portion of the amount which he subscribed. In some cases, such as banks, a double liability is imposed upon the stockholders. This is done to furnish additional security to those dealing with a corporation which is doing a semipublic business.

After all obligations of the corporation are paid, the assets are distributed *pro rata*, according to the quantity of stock held by each stockholder, when the corporation is dissolved.

If the stockholders withdraw for their private use any of the assets of the company, to the detriment of creditors of the company, they will be liable individually to such creditors for the amounts so received.

150. Dissolution. — A corporation may be dissolved by:

(*a*) *Limitation.* By limitation is meant the expiration of the time stated in the charter.

(*b*) *Voluntary dissolution.* The charter is a contract between the state and the corporation, and cannot be surrendered except with the consent of the state and in accordance with formalities prescribed by the state. In every case creditors must be satisfied.

(*c*) *Repeal of the charter by the state*, when the right to repeal was reserved by the state in the charter. Since the charter constitutes a contract between the state and the corporation, the state cannot repeal the charter unless it reserved the right at the time the charter was granted.

(*d*) By *forfeiture of the charter*, upon the decree of a proper court for non-use or mis-use of the powers granted to the corporation. Mere failure to use, or mis-use of the charter powers does not itself effect dissolution, but either will serve as a ground upon which an action may be brought in a proper court to dissolve the company. Combinations in unreasonable restraint of trade have been dissolved for misusing their corporate powers.

A foreign corporation in any state is one that is chartered outside that state. Each state may prescribe regulations under which such corporations may do business within its jurisdiction, and such regulations must be strictly complied with by all foreign corporations seeking to do business there.

LESSON LXXIII

151. Cases on Corporations.

(1) *Brisay* v. *Star Company*, 13 Misc. (N. Y.) 349. — The defendant was a corporation organized for the purpose of printing, publishing, and selling newspapers. In its newspaper it printed an offer to pay

$500 to the heir of any person who met death by accident, and who had on his person at the time of his death a copy of the current issue of the paper. The plaintiff was the mother and heir of a person who was killed with a copy of the paper on his person, all as required by the offer, and she brought suit for the $500.

(2) *Brisbane* v. *D. L. & W. R. R. Co.*, 25 Hun. (N. Y.), 438. — Benedict was the owner of ten shares of the stock of the defendant company. The certificate stated that he was entitled to the ten shares transferable only on the books of the company upon surrender of the certificate. Benedict in 1856 sold his stock to Brisbane and executed a power of attorney to Brisbane to transfer the shares on the books of the company. Brisbane took the certificate, but the transfer on the books was not made. Benedict died and after his death, in 1876, his administrator procured a transfer of the shares to himself and also procured the payment of dividends credited to Benedict between 1856 and 1876. Brisbane sued the company for the value of the ten shares transferred to the administrator and also for the amount of the dividends paid to him.

(3) *Siegman* v. *Kissel*, 65 Atl. Rep. 910. — Kissel was a director in the Electric Vehicle Company and during his term of office voted to declare two dividends, amounting to $325,000, out of the capital and not out of the profits of the company. Siegman sued as a stockholder to compel Kissel to repay to

the company the amount of the two dividends as declared. Kissel pleaded that a large majority of the stockholders had approved the payment of the dividends and had waived the right to recover them.

(4) *Walker* v. *Lewis*, 49 Tex. 123. — Walker was a stockholder in an insolvent corporation, holding stock of par value of $10,000 on which he had paid to the company only $4000. The corporation owed Lewis $8500, and when it became insolvent, Lewis sued Walker for the amount of the indebtedness and obtained a judgment for the whole amount. Walker appealed from the judgment.

(5) *Wright* v. *Hughes*, 119 Ind. 324. — The Franklin Insurance Company was organized to conduct a life insurance business. It became financially embarrassed and borrowed a large sum of money, giving a bond secured by a mortgage for the amount. The company failed and had not enough assets to pay its policyholders, one of whom brought suit to have the mortgage declared void and canceled, and to have the mortgagee restrained from claiming the return of the money loaned.

(6) *Hempfling* v. *Burr and Sands*, 59 Mich. 294. — Burr was president and Sands cashier of a bank. Hempfling secured a loan at the bank and gave as security certain stock. Just before the note fell due, Hempfling asked if he should pay the note or wait until his return from a contemplated journey. Burr told him to wait. When the note fell due, Burr sold

the stock to Sands, paid the note, and advised Hempfling of what he had done. Hempfling then commenced an action for damages. Burr defended on the ground that he had acted entirely in an official capacity for the bank, had no personal interest in the transaction, and was not liable personally.

(7) *State of Alabama* v. *Capital City Water Co.*, 105 Ala. 406. — The water company was chartered to supply a city and its inhabitants with pure, wholesome, and deep well water, suitable for all purposes, and sufficient in quantity for all uses of said city and its inhabitants. For some years this provision was carried out, but finally the company supplied impure river water to the city on several occasions, claiming that the supply from its wells was not adequate. The state then brought a proceeding to forfeit the charter of the company, and after the proceeding was brought, the company enlarged its plant and was prepared to furnish proper water.

(8) *Mason* v. *Pewabic Mining Co.*, 133 U. S. 50. — Mason was a stockholder in the defendant company. When the charter of the company expired by limitation, the directors arranged for a sale of its assets to another company, and the stockholders of the Pewabic Company were to receive their *pro rata* share of the proceeds in stock of the second company or in money. The sale was authorized by a large majority of the stockholders, Mason voting against it. Mason then brought suit to enjoin the transfer of the assets of the Pewabic Company and for the ap-

pointment of a receiver to sell the assets and distribute the surplus among the stockholders after paying the debts.

LESSON LXXIV

(1) *Paul* v. *Virginia*, 8 Wall. (U. S.) 168. — The State of Virginia passed a law providing that no insurance company not incorporated in the state should be allowed to do business there without obtaining a license and depositing with the state treasurer bonds of a specified character amounting to about $50,000. There was also passed a law imposing a fine on any person who acted as agent for a foreign insurance company without a license. Paul was appointed agent for Virginia of a New York insurance company. He demanded a license to act as such agent and offered to comply with all the requirements of the law, except the deposit of the bonds required. The license was refused, but Paul, nevertheless, issued a policy in the New York company, for which he was fined $50. He appealed from the judgment to the Supreme Court of the United States on the ground that the Virginia law was unconstitutional and denied the equal protection of the laws to citizens of various states.

(2) *Hastings* v. *Drew*, 76 N. Y. 9. — Certain stockholders and directors of a steamboat company took over for their own use, by mutual agreement, one of the steamers belonging to the company.

Hastings, a judgment creditor, sued Drew, one of the stockholders, for that part of the value of the steamer received by him.

(3) *Downing* v. *Mt. Washington Road Co.*, 40 N. H. 230. — A charter was granted the defendant company to make and keep in repair a road to the top of Mt. Washington, to take toll of passengers and carriages, to build and own tollhouses, and to take land for a road. The company afterward established a stage and transportation line and bought carriages and horses for that purpose. This action was brought to restrain them from operating the transportation line.

(4) *Mallory* v. *Hanaur Oil Works*, 86 Tenn. 598. — Several corporations were engaged in manufacturing cottonseed oil. They made an agreement to select a committee, composed of representatives of each corporation, and to turn over to this committee the properties and machinery of each company so that the business of each might be operated and managed for a specified time by this committee for the common benefit, the losses or profits to be shared in certain proportions. This action was brought to restrain the corporations from so uniting.

(5) *Overseers of the Poor of Hillsdale* v. *Shear*, 13 Johns. (N. Y.) 495. — The Board of Overseers brought this action against Shear for his failure to support a pauper, whereby the town had been damaged. Shear had promised a previous board that he would support the pauper, but he defended this action on

the ground that the plaintiffs were not the promisees of his promise and had no right to bring the action.

(6) *Vanneman* v. *Young et al.*, 52 N. J. L. 403. — Young and the other defendants formed a corporation called the Clayton Bottle Works and recorded the certificate of incorporation in the county clerk's office of the proper county, as required by law, on November 9, 1886. The law also required that the certificate be filed with the secretary of state, but this was not done until August 17, 1887. Between November 9, 1886, and August 17, 1887, the plaintiff sold certain materials to the corporation and, when he was not paid for them, brought suit against the members of the corporation individually, claiming that they were liable as partners since the certificate of incorporation had not been filed with the secretary of state when the purchase of materials was made. Are the defendants liable as partners?

(7) *Dreisbach* v. *Price et al.*, 133 Pa. St. 560. — The defendants were all stockholders in the insolvent Miner's Bank, of which Dreisbach was the assignee for the benefit of creditors. The charter of the bank provided that "the stockholders of said bank shall be held individually liable for all debts of said bank, to the extent of double the amount of the stock subscribed for or held by them." Relying on this clause of the charter, Dreisbach demanded from each stockholder $200 for each $100 share of stock held by him and also demanded certain unpaid stock subscriptions. The defendants claimed

that they should forfeit their stock and $100 per share in addition instead of $200 per share.

(8) *Tracy* v. *Talmage*, 14 N. Y. 162. — The North American Trust and Banking Company purchased from the Morris Canal and Banking Company certain bonds and paid for them by time notes, which the American company not only was not authorized to make, but was forbidden to make under statutory penalty. Can the Morris company recover in a suit on the notes, or can it recover the price of the bonds in any other way?

(9) *Page* v. *Heineberg*, 40 Vt. 81. — The Vermont Central Railroad Company purchased certain land for the use of the railroad, but found that land was not necessary for such use and sold it to the defendant. Page claimed that the company had no right to hold real estate generally; that when it was not used for railroad purposes, the land reverted to the original owner; that consequently the defendant acquired no title from the company, and Page brought an action of ejectment as the heir of the original owner of the land.

LESSON LXXV

(1) *Williams* v. *Western Union Telegraph Co.*, 93 N. Y. 162. — The telegraph company was about to pay a dividend to its stockholders in the form of shares of its capital stock, when Williams, a stockholder, brought this action to enjoin the payment of

such dividend, on the ground that such dividend was from the capital stock and not from the surplus profits and therefore illegal. It was proved that the company owned property equal in value to the amount of its share capital and the amount of the proposed dividend.

(2) *Moore* v. *Schoppert*, 22 W. Va. 282. — The plaintiff was president of a company owning a toll road. One of the counties through which the road passed took possession of a tollgate and appointed Schoppert keeper thereof. The company brought ejectment proceedings to oust Schoppert from the land, and the county defended on the ground that certain irregularities of management in the company were sufficient to work a forfeiture of its charter, and under the statute the county was justified in taking property of a dissolved corporation.

(3) *Mayor & Aldermen of Jonesboro* v. *McKee*, 2 Yer. 167. — The plaintiff, a corporation, sued the defendant for non-payment of taxes. He defended on the ground that the plaintiff's powers were described and limited by its charter, and that the charter conferred no power to sue in its own name.

(4) *Railroad Co.* v. *Ayres*, 56 Ga. 230. — The plaintiff brought suit against Ayres to recover a portion of his subscription to the stock of the company. Ayres gave evidence that the stock was valueless, and that, although he had paid part of his subscription, he refused to pay the balance when the stock became valueless.

(5) *Petition of Argus Co.*, 138 N. Y. 557.—A stockholder in the Argus Co. made an agreement with certain other stockholders not to sell his stock without giving the other parties to the agreement an opportunity to purchase. Nevertheless, he transferred a number of shares to his son who had the proper transfer made on the books of the company. The son then voted at an election of directors, and it was sought to have the election set aside on the ground that the son's votes were illegal and void.

(6) *Scovill* v. *Thayer*, 105 U. S. 143.—Thayer subscribed for certain stock in the Fort Scott Coal and Mining Co. He paid 20 per cent of the amount of his subscription and made a written agreement with the company on a good consideration that no further payments should be made for the stock and that full-paid shares should be issued to him. The company became bankrupt, and Scovill, as assignee for the benefit of creditors, sued Thayer for the unpaid balance of his subscription.

(7) *Winscott* v. *Investment Co.*, 63 Mo. App. 367.—Winscott paid the defendant $500 and received a written agreement to deliver to him five shares of preferred stock of the company, when issued, or to return the money. In an action on the agreement, the company pleaded that the corporation had no power to issue preferred stock, or to agree to do so; that the agreement was void and of no effect, and could not afford a basis for suit.

LESSON LXXVI

PROCEDURE AND REMEDIES

152. In General.
153. Law and Equity.
154. Jurisdiction.
155. Pleading and Practice.
156. Damages.
157. Remedies, Legal and Equitable.
158. Provisional Remedies.

152. In General. — To permit the regular and orderly administration of the law, certain forms of procedure have been adopted and strictly adhered to. The fact that many suits are decided on technical grounds, without reference to the merits of the case, is often cited as a reproach to our courts and judges. Doubtlessly, harm may be wrought in some cases, but it must be remembered that an undue relaxation of the rules of procedure would result in a chaotic condition in which nobody could secure justice. It is better that an occasional individual should suffer, than that the whole administration of justice should be uncertain and ineffective.

In the old common law courts in England the rules of procedure were exceedingly strict and complicated.

They provided for many successive steps of pleading and counterpleading and the penalty for a mistake anywhere along the line was the dismissal of the suit. By gradual changes and amendments, chiefly by the enactment of practice acts by the various legislatures, the strictness of common law pleading has been done away with and now our rules of procedure are relatively simple.

153. Law and Equity. — A reference to the history of courts of law is necessary to explain the importance of the distinction between law and equity. Under the old English common law system a court of law could only pass upon questions that could be brought before it by one or another of the recognized writs, or forms of action. Thus, if a man trespassed on my land I could buy a writ of trespass and proceed against him; or, if a man kept property to which I was entitled, I could buy a different writ and proceed against him; and so in other cases. The number of these writs was necessarily limited and questions were constantly arising which were not covered by the writs and for which, therefore, there was no remedy, whereby great injustice was done. The practice then grew up of addressing a petition to the king, as the source and head of all justice, setting forth the facts of the case, stating that the petitioner could get no relief in the courts of law and asking the king to do justice between the parties. These petitions became so numerous that the king turned them over to his chancellor to see that justice

was done. The chancellor came to have a regular office, called chancery, for the disposition of these petitions, and to this day courts of equity are frequently called chancery courts. In this way the legal business of the country was done by two sets of courts. To the law courts went all cases involving the payment of a sum of money only, or the recovery of a specific thing. When the relief required was the performance or non-performance of an act, the court of equity heard the case. A court of equity acts *in personam*, that is, it commands a person to do or not to do certain things, and in connection with such a command it may incidentally award a sum of money as damages. This distinction is still found, in a more or less pronounced form, in all our systems of practice.

154. Jurisdiction. — Before a court can act in any case, it must have the parties legally before it, and not until then does it have authority over the parties or the subject of the action. This authority is called jurisdiction. In every state there is some court of general jurisdiction, whose power extends throughout the state. If any person in the state receives a mandate of such court, whether it be a summons, subpœna, injunction, or what not, he must obey it or suffer the consequences. The power of such a court also extends to property within the state, and the court may take jurisdiction of an action involving the property, even though the owner of it may be beyond the limits of the court's power. This question of juris-

diction is very important, as any act performed by a court without jurisdiction is absolutely void.

Federal Courts. — In addition to the courts of each state in the Union there is a body of courts known as *Federal* or *United States Courts*. These courts have jurisdiction of all questions arising under the laws, treaties, and Constitution of the United States (as distinguished from the laws and constitution of any particular state), of actions between citizens of different states, and of actions to which a state is a party. The lowest of these courts are the District Courts, of which there are about eighty throughout the United States. From a District Court an appeal may be taken to the Circuit Court of Appeals for the circuit of which the district is a part, and from that court to the Supreme Court of the United States in certain cases.

155. Pleading and Practice. — There are certain legal terms in connection with procedure with which the student should be familiar.

Summons. — A mandate of a court requiring the defendant served therewith to appear before the court and answer the complaint of the plaintiff. If such appearance and answer is not made within the specified time, the plaintiff may take judgment by default.

Plaintiff. — A person bringing an action at law. A complainant.

Defendant. — A person against whom an action is brought. A respondent.

Subpœna. — A mandate of a court requiring the person served therewith to appear before the court and testify as a witness. Failure so to appear is contempt of court, and is punishable by fine and imprisonment.

Subpœna duces tecum. — A subpœna requiring the prospective witness to bring with him certain books and papers specified in the subpœna.

Complaint. — A statement of the plaintiff's cause of action against the defendant.

Answer. — The defendant's pleading in reply to the complaint, setting forth his defense.

Counterclaim or Set-off. — A claim in favor of the defendant against the plaintiff which the defendant sets up to diminish or defeat the plaintiff's recovery.

Demurrer. — A claim by either party that, admitting the fact set forth to be true, no cause of action has been stated by the opposing party. A demurrer raises a question of law only.

Bill of Particulars. — A bill of particulars is an amplification of the claim made by either party to an action, setting forth in detail the items making up the claim. In a proper case it must be furnished at the request of the opposing party.

A Lawsuit. — The normal course of an action at law is as follows: The person who desires to press his claim through the courts must first engage the services of an attorney, as an attorney is an officer of the court and he alone is allowed to practice law. If, upon examination of the facts and the law, the claim

seems to him well founded, the attorney will cause a summons to be personally served upon the defendant. With the summons a copy of the complaint may be served, or the complaint may be withheld until the defendant has appeared by an attorney. Within a specified time after the service of the complaint, the defendant must serve his answer or demurrer to the complaint. Issue is then said to be joined and must be tried.

If a demurrer was made to the complaint, the issue is called an issue of law and must be tried by a judge alone, as a jury cannot pass upon questions of law. If the plaintiff wins on the trial of the demurrer, the defendant must answer the complaint or have judgment taken against him. If the defendant wins, the plaintiff must amend his complaint so as to state a cause of action, or the action will be dismissed.

If the defendant answers the complaint, a trial by judge and jury must be had. The jury is composed of twelve men chosen by lot from a number summoned to attend in court for that purpose. To be eligible to serve as a juror, a man must possess certain qualifications of age, property, etc., and when summoned as juror, he must appear or be punished for contempt of court.

If the defendant is successful at the trial, the verdict of the jury and the judgment of the court are in his favor, the action is dismissed, and the costs of the action must be paid by the plaintiff. If the plaintiff is successful, he is awarded by the jury such

amount as he has proved he is entitled to, and the costs of the action must be paid by the defendant. A judgment for the amount of the damages and costs is then filed in court, and an *execution* issued to the sheriff of the county, requiring him to take such property of the debtor as he can find and sell it to satisfy the judgment. The sheriff must then take and sell the property under the execution, or make a return of "*nulla bona*," *i.e.* that he can find no goods of the debtor. In the latter case, the creditor can compel the debtor to appear in court and submit to an examination in *supplementary proceedings*. By this examination the creditor endeavors to learn whether the debtor has any property which the sheriff could not find, and which can be seized and sold to satisfy his debt.

The procedure in a suit in equity differs considerably in the various states, but in general it may be said that it is tried by a judge without a jury, and that the final judgment commands or forbids the performance of an act, instead of being for a sum of money, and that disobedience of the judgment is punishable by fine and imprisonment as a contempt of court.

156. Damages. — The law is careful to provide that a litigant shall not recover more than the amount of the damage he has actually suffered. This amount must be very carefully proven, and the plaintiff can recover no more than he proves, no matter how much he may demand in his complaint.

The law also requires that he shall minimize the damage to the best of his ability. For example, if A is engaged to teach a school for a year, but his employer refuses to allow him to carry out his contract, he has a claim for damages for the full amount of his salary, but he must reduce this amount as much as possible by using every reasonable effort to obtain similar employment, and any amount he is able to earn must be deducted from his claim.

It is often provided in contracts that if a party fails to perform, he shall pay a designated sum as *liquidated damages*. The object of such provisions is to make recourse to a lawsuit unnecessary to determine the amount of damages to be paid. Such provisions are looked upon with suspicion, and if the amount is so far beyond the actual damage suffered as to be in effect a penalty, its payment will not be enforced.

157. Remedies. — The only remedy afforded by an action at law is a judgment for a sum of money as damages. It sometimes happens that such a judgment would not afford to the plaintiff adequate relief, and in such cases relief may be had in equity. For example, when a contract requires the delivery of a certain piece of real estate, or a work of art, or something which is unique and for the loss of which money would not compensate, a court of equity may decree *specific performance* of the contract and require the party in default to deliver the particular thing which was the subject of the contract. Again,

if a famous singer contracts to give all his services to a certain theater, and then agrees to sing in some other theater, an *injunction* may be issued to prevent him from breaking his contract, as no other person can take his place and no money value can be placed on the loss of his services.

158. **Provisional Remedies.** — These remedies are four in number, viz., *Arrest*, *Attachment*, *Injunction*, and *Replevin*, and are employed during the progress of an action to assist or preserve a party's rights until the final determination of the action.

Arrest. — In an action on contract where the defendant was guilty of fraud, or where the defendant has removed or is about to remove his property with intent to defraud his creditors, or where, by the final judgment in an action, the defendant may be required to perform some act and there is danger that he may remove from the state and so render the judgment ineffectual, the defendant may be arrested by order of the court or judge, and may be detained in custody unless he produces satisfactory bail.

Attachment. — If the defendant in an action is a non-resident or a foreign corporation, or if he has departed from the state or keeps himself concealed to avoid service of process, or if he has removed or is about to remove his property from the state with intent to defraud his creditors or has assigned or secreted it, or is about to do so with such intent, any of the defendant's property may be seized by the sheriff under a warrant of attachment and kept by him until

the determination of the action. In many states the requirements for attachments are not so strict, and in some states almost every action is commenced by attachment.

Injunction.—When any person can show to a court sufficiently good cause, he may obtain, at once and without a hearing, an injunction forbidding the performance of any threatened act. Such an injunction will be granted only for a short time, but the persons enjoined must appear and show cause why it should not be continued.

Replevin.—When a plaintiff has brought suit to recover a particular thing from the defendant, he may require the sheriff to take the thing into his custody, by virtue of a writ of replevin, and keep it until the final determination of its ownership.

INDEX

Absolute defense, 157.
  property, 64.
Acceptance, of a draft, 167.
  for honor, 168.
  supra protest, 168.
  virtual, 169.
Accident insurance, 204.
Accord and Satisfaction, 28.
Acts, against public policy, 12.
  fraudulent, 15.
  immoral, 14.
  in desecration of the Sabbath, 14.
Adequacy of consideration, 26.
Agency, by estoppel, 234.
  by necessity, 235.
  cases on, 240.
  coupled with an interest, 240.
  how performed, 124.
  how terminated, 238.
  ratification of, 234.
Agent, defined, 233.
Agent, General, 235.
  Special, 235.
Agents, Kinds of, 235.
Alien enemies, 11.
Alteration of contract, 2.
Answer, 291.
Application for insurance, 192.
Approval, sale on, 80.
Arrest, 293.
Articles, of copartnership, 251.
  of incorporation, 267.
Assignment of lease, 109.
Attachment, 293.
Attorney, power of, 234.

Bailee, defined, 124.
  liability of, 129.
  lien of, 128.
Bailment, 124.
  classification, 126.
  exceptional, 137.
Bailment, how created, 125.
  termination of, 130.
  tortious, 125.
  use of property, 127.
  warranties in, 129.
Bailments, cases on, 131.
Bailor, 124.
Bank draft, 164.
Bargain and Sale, contract of, 71.
  deed, 112.
Barter, 70.
Bets or wagers, 14.
Bill of Exchange, 156.
  foreign, 164.
  inland, 164.
Bill of particulars, 289.
Bills of Exchange, Kinds of, 164.
Bills of Lading, 157.
Bona fide holder, 157.
Bond, coupon, 157.
Breach of warranty, 85.

Capital Stock of corporations, 269.
Care, degrees of, 126.
Cases, on agency, 240.
  on bailments, 131.
  on contracts, 41.
  on corporations, 275.
  on fixtures, 68.
  on guaranty and suretyship, 225.
  on insurance, 206.
  on laws of innkeepers, 139.
  on negotiable instruments, 176.
  on partnership, 258.
  on personal property, 88.
  on real property, 115.
Casualty insurance, 203.
Caveat emptor, 20.
Chattel mortgage, 82.
Civil law, 4.
Commercial law, 4.
Common Carrier, 142.

Common Carrier, charges of, 142.
delivery by, 146.
liability of, 144.
lien of, 143.
of passengers, 147.
Common Carriers, cases on, 148.
Common law, 2.
Common stock, 272.
Complaint, 289.
Condition, precedent, 83.
subsequent, 83.
Consent, reality of, 18.
Consideration, adequacy of, 26.
as to time, 26.
defined, 23.
failure of, 27.
in guaranty, 28.
moral obligation as, 27.
presumption of, 23.
valuable, 24.
Constitutional law, 2.
Constructive contract, 7.
delivery, 77.
Continuing guaranty, 220.
Contract, against public policy, 13.
bilateral, 17.
cases on, 41.
consideration, 23.
construction, 7.
defined, 5.
discharge of, 28.
divisible, 30.
elements, 6.
executed, 8.
executory, 8.
express, 6.
form of, 6.
formal, 7.
implied, 6.
indemnity, 189.
indivisible, 30.
in restraint of marriage, 13.
in restraint of trade, 13.
land, 112.
made on Sunday, 14.
marriage, 40.
of infants, 9.
of insane persons, 10.
Contract, of married women, 11.
of sale, 70.
of wagers, 14.
oral, 7.
parol, 7.
parties to a, 8.
quasi, 7.
real property, 40.
simple, 7.
specialty, 7.
subject matter, 12.
uberrima fides, 22.
under seal, 7.
unilateral, 17.
Contribution, 219.
Conveyances, 111.
Corporation, lay, 267.
Corporations, defined, 266.
capital stock of, 269.
cases on, 275.
dissolution of, 274.
dividends of, 272.
how created, 266.
kinds of, 267.
liabilities of stockholders, 274.
management of, 271.
powers of, 268.
stock dividends, 273.
ultra vires acts, 273.
voting, 271.
Counterclaim, 289.
Credit, insurance, 205.
letter of, 169.
Creditor, 217.
Criminal law, 4.
Curtesy, estate by, 105.

Damages, liquidated, 292.
Days of grace, 176.
Debtor, 217.
Deed, Bargain and sale, 112.
delivery in escrow, 114.
delivery of, 114.
full covenant warranty, 112.
quitclaim, 111.
recording of, 114.
Default, notice of, 221.
Defendant, 288.
Defenses, kinds of, 157.

Delivery by common carrier, 146.
constructive, 77.
in escrow, 114.
Demand and presentment, 174.
Demurrer, 289.
Discharge of contract, 28.
Dishonor, notice of, 177.
Dissolution of corporation, 274.
by forfeiture of charter, 275.
by limitation, 274.
by repeal of charter, 275.
Dissolution of partnership, 256.
causes of, 256.
notice of, 257.
Domain, eminent, 104.
Dormant partner, 253.
Dower estate, 105.
Draft, acceptance of, 167.
bank, 164.
defined, 164.
personal, defined, 164.
sight, 166.
three-party, 165.
time, 166.
two-party, 165.
Drafts, kinds of, 164.
Drawee of draft, 156, 157.
Drawer of draft, 156, 167.
Duress, 21.

Earnest money, 77.
Easements, 102.
Ecclesiastical corporation, 267.
Elevator insurance, 205.
Emblements, 106.
Eminent domain, 104.
Employers' liability insurance, 204.
Endowment policy, 200.
Equity and law, 286.
Estate by curtesy, 105.
by the entirety, 111.
dower, 105.
for life, 105.
for years, 107.
in fee simple, 104.
in land, 104.
in severalty, 110.
legal, 110.
Estoppel, 234.
Exceptional contracts, 137.
Executed contract, 8.
Execution, 293.
Executory contract, 8.
Existence, potential, 78.
Express contract, 6.
Express warranty, 83.

Failure of consideration, 27.
Federal courts, 290.
Fee simple, estate in, 104.
Fidelity insurance, 204.
Fiduciary relations, 22.
Fire insurance, defined, 189.
important clauses, 193.
proof of loss, 195.
Fixtures, 65.
Foreign bills of exchange, defined, 164.
Foreign corporation, 275.
Formal contract, 7.
Fraud, 21.
Fraudulent acts, 15.
Full covenant warranty deed, 112.

General agent, 235.
Good consideration, 24.
Grace, days of, 176.
Guaranties, kinds of, 220.
Guarantor, 219.
Guaranty, 216, 220.
and suretyship, 216.
consideration of, 218.
continuing, 220.
contract, 216.
general, 220.
limited, 221.
of collection, 221.
of payment, 221.
special, 220.
Guest, 138.

Holder for value, 157.
Homestead act, 106.

Immoral acts, 14.
Implied contract, 6.
Implied warranty, 83.
Indemnity contracts, 189.

Indorsee, 170.
Indorsements, kinds of, 171.
Indorser, defined, 170.
Indorser's contract, 170.
  kinds of, 170.
  liability, 173.
  notice to, 173.
Infants, contracts of, 9.
Influence, undue, 22.
Injunction, 294.
Inland bill of exchange, 164.
Innkeeper, defined, 137.
  liability of, 138.
Innkeepers, cases on laws of, 139.
Innkeeper's lien, 139.
Insane persons, contracts of, 10.
Insurable interest, 191, 197.
Insurance, accident, 204.
  alienation clause, 194.
  application for, 192, 198.
  cancellation clause, 195.
  cases on, 206.
  casualty, 203.
  credit, 205.
  elevator, 205.
  employer's liability, 204.
  fidelity, 204.
  fire, 189.
  life, 196.
  lightning clause, 193.
  marine, 205.
  policy, fire, 190.
  proof of loss, 195.
  pro rata clause, 194.
  rebuilding clause, 195.
  renewal, 195.
  standard fire, 190.
  title, 205.
  vacancy clause, 194.
Insured, 190.
Insurer, 190.
Interest, legal rate, 178.
  maximum rate, 178.
International law, 1.
Interstate Commerce Law, 143.
Irregular indorser, 170.

Joint and several note, 163.
Joint note, 163.
Joint tenancy, 110.
Jurisdiction, defined, 287.

Land, estates in, 104.
Landlord, 107.
Law, and equity, 286.
  civil, 4.
  commercial, 4.
  common, 2.
  constitutional, 2.
  criminal, 4.
  defined, 1.
  International, 1.
  Interstate Commerce, 143.
  merchant, 154.
  moral, 1.
  municipal, 2.
  natural, 1.
  statute, 3.
  suit, 289.
Lay corporation, 267.
Lease, 107.
  assignment of, 109.
  subletting under, 110.
Legal rate of interest, 178.
  tender, 31.
Letter of credit, 169.
Liability of bailee, 129.
  of common carrier, 144.
  of indorsers, 173.
  of innkeeper, 138.
Lien, of bailee, 128.
  of common carrier, 143.
  of innkeeper, 139.
  seller's, 87.
Life insurance, 196.
  application for, 198.
  beneficiary, 197.
  insurable interest, 197.
  kinds of, 199.
  parties and the contract, 197.
  premium, 196.
Life tenant, 105.
Limitations, Statute of, 34.
Limited guaranty, 221.
  partner, 253.
Liquidated damages, 292.

Maker of promissory note, 163.

Marine insurance, 205.
Married women, contracts of, 11.
Maturity date, how computed, 177.
Merchant, law, 154.
Mistake regarding contract, 19.
Money, earnest, 77.
Moral law, 1.
  obligation, 27.
Mortgage, chattel, 82.
  real property, 113.
Municipal law, 2.
Mutual agreement, 15.
Mutual assent, 15.
Mutual insurance company, 189.

National Bankruptcy Law, 32.
Natural law, 1.
Navigable streams, 101.
Necessaries, defined, 9.
Negotiability, 156.
Negotiable instruments, 155.
  cases on, 176.
  contracts of parties to, 162.
  defenses, 157.
  delivery of, 161.
  form of, 159.
  kinds of, 15.
  presentment of, 174.
  statute, 155.
Negotiation, definition of, 169.
Nominal partner, 253.
Non-navigable streams, 100.
Note, promissory, defined, 156.
  joint, 163.
  joint and several, 163.
  parties to a, 163.
  several, 162.
Notice of default, 221.
  of dishonor, 177.
  of dissolution of partnership, 257.
  of protest, 177.
  to indorsers, 173.

Offer and acceptance, 15.
Oral contracts, 7.
Ostensible partner, 252.

Parol contract, 7.
Parties, to a contract, 8.
Parties, to a promissory note, 163.
Partner, dormant, 253.
  limited, 253.
  nominal, 253.
  ostensible or public, 252.
  secret, 252.
  silent, 253.
  special, 253.
Partners, choice of associates, 255.
  compensation of, 255.
  kinds of, 252.
  liability of, 254.
  power of majority of, 255.
Partnership, articles of, 251.
  by estoppel, 252.
  cases on, 258.
  defined, 258.
  dissolution of, 256.
  how formed, 250.
Passengers, carriers of, 147.
Passing of title, 78.
Payee of promissory note, 163.
Payment, guaranty of, 221.
Personal draft defined, 164.
  property, 64.
Plaintiff, 288.
Pleading and practice, 288.
Pledge, 128.
Potential existence, 78.
Power of attorney, 234.
Preferred stock, 271.
Premium, 189.
Presentment and demand, 174.
Presentment, waiver of notice of, 178.
Presumption of consideration, 23.
Principal, defined, 233.
  liability of, 236.
  obligations of, 237.
Private corporation, 267.
Procedure, 285.
Proceedings, supplementary, 291.
Promissory note, defined, 156.
  parties to a, 163.
  payee of, 163.
Promissory notes, kinds of, 162.
Property, absolute, 64.
  in general, 63.
  personal, 64.

Property, real, 64.
special, 64.
use of bailed, 127.
Protest, notice of, 177.
Provisional remedies, 293.
Proxy, voting by, 272.
Public corporation, 267.
partner, 252.

Quasi contract, 7.
Quitclaim deed, 111.

Ratification of an agency, 234.
Reality of consent, 18.
Real property, 64, 100.
contracts, 100.
conveyances, 111.
corporeal and incorporeal, 102.
mortgage, 113.
Receipt, warehouse, 157.
Regular indorser, 170.
Remedies, by action at law, 292.
for breach, 85.
provisional, 293.
Replevin, 294.

Sale of personal property, 70.
Sales, warranties in, 83.
Secret partner, 253.
Seller's lien, 87.
Set-off, 291.
Several note, defined, 162.
Sight draft, 166.
Silent partner, 253.
Simple contract, 7.
Special agent, 235.
guaranty, 220.
partner, 253.
property, 64.
Specialty contract, 7.
Specific performance, 292.
Statute law, 3.
Negotiable Instruments, 155.
Statute of Frauds, 36.
Statute of Limitations, 34.
Stock, common, 27.
cumulative preferred, 270.
preferred, 270.
treasury, 271.
Stoppage *in transitu*, 87.
Straight life policy, 199.
Subagents, 238.
Subject matter, of contracts, 12.
Subpœna, defined, 289.
duces tecum, 289.
Subrogation, 218.
Subterranean water, 101.
Summons, 288.
Supplementary proceedings, 291.
Surety, 217.
Suretyship, 222.
Surrender values, 201.

Tenancy in common, 110.
joint, 110.
Tenant, 107.
at will, 109.
life, 105.
Termination of agency, 238.
Termination of bailment, 130.
Three-party draft, 165.
Time draft, 166.
Title insurance, 205.
Title, passing of, 78.
Treasury stock, 271.
Two-party draft, 165.

Ultra vires acts of corporations, 273
Undue influence, 22.
Unidentified goods, sale of, 81.
Usury, defined, 178.

Valuable consideration, 24.
Virtual acceptance, 169.
Voting by proxy, 272.

Wagers, contracts of, 14.
Waiver of notice of presentment, 178.
Warehouse, receipt, 157.
Warranties, 83.
in bailment, 129.
in sales, 183.
remedies for breach of, 85.
Waste, 106.
Water, subterranean, 101.
Will, tenant at, 109.

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